

APPENDIX
VOLUME I—(pp.1-177)

Supreme Court, U.S.

FILED

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MICHAEL RUDAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION,

Petitioner

—v.—

GTE SYLVANIA, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED SEPTEMBER 27, 1979
PETITION FOR A WRIT OF CERTIORARI GRANTED
DECEMBER 3, 1979

In the Supreme Court of the United States

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CONSUMER PRODUCT SAFETY COMMISSION,
Petitioner

—v.—

GTE SYLVANIA, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4/21/75	#1	Complaint for declaratory judgment and injunction. Summons issued. (Exit writ to Marshal.)
4/24/75	#2	Pltf's. application for T.R.O.
4/24/75	#4	Application for preliminary injunction.
4/24/75	#5	Affidavit of W. Daniel Schuster.
4/24/75	#6	Affidavit Kenneth C. Thomson.
4/24/75	#7	Affidavit of Robert L. Palmer
4/25/75	H.	Hearing Latchum J. are T.R.O.—GRANTED.
4/28/75	#8	Notice of Assignment of J. (Latchum). Notice to Counsel.
5/14/75	C.	Conf. Latchum. Arg. 7/16/75 11 a.m.
5/29/75	#10	ORDER LATCHUM Ch J consolidating the following cases C.A. 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for purposes of discovery, briefs etc. & Arg. set for 7/23/75 at 11:00 Am. (Notice to counsel).
5/29/75	#11	ANSWER.
6/16/75	#13	Sealed envelope containing Motion to modify T.R.O., affidavit of Richard O. Simpson, memo. in support of motion w/proposed order. (Govt's).
6/17/75	#14	Govt's. notice of hearing on defts'. motion to modify T.R.O. 6/30/75 at 2 p.m.
6/19/75	#15	Sealed envelope Memo of Motorola in support of motion for prelim. inj.
6/19/75	#16	Sealed envelope Memo of Matsushita in support of motion for prelim. inj.
6/19/75	#17	Sealed envelope Memo of Toshiba in support of motion for premlim. inj.
6/19/75	#18	Sealed envelope Affidavit of Hajime Yamato.
6/19/75	#19	Sealed envelope Affidavit of Yoshihiro Nagatake.

DATE	NR.	PROCEEDINGS
6/19/75	#22	Joint Memo of law for Magnavox & Zenith in support of motion for prelim. inj.
6/25/75	#24	Joint memo. in support of applications for preliminar. injunc. (Sealed)
6/25/75	#25	Affidavit of Richard L. Sanderson. (Sealed)
6/25/75	#26	Affidavit of John F. Eisenmann. (Sealed)
6/25/75	#27	Joinder by Sharp Electronics Corp. in joint memo. of law submitted on behalf of Zenith and Magnavox.
6/26/75	#28	Joint memo. of GTE Sylvania and Aeronutronic Ford in response to defts'. motion for modification of outstanding T.R.O.s.
6/27/75	#29	Response by Matsushita to Consumer Product's motion to modify T.R.O. (Sealed)
6/27/75	#30	Govt's. supplement to motion to modify T.R.O.
6/27/75	#31	Admiral's response to defts'. motion for order modifying T.R.O.
6/30/75	H.	Hearing Latchum J. re deft's. motion to modify T.R.O. Order to be issued.
6/30/75	#32	Pltfs. GTE Sylvania and Aeronutronic's notice and motion to have affidavit of Richard L. Sanderson (paper #25) remain under seal. SO ORDERED Latchum J. (Counsel present)
7/1/75	#33	Magnavox's response to defts'. motion for order modifying T.R.O.
7/7/75	#34	RCA's notice of filing proposed order and proposed order re defts'. motion to modify T.R.O.
7/8/75	#35	Sealed envelope containing Govt's. motion for summary judgment, opposition to pltf's. motion for prelim. injunc., cert. copy of adminis. record, memo. in support of deft's. motion for summary judgment & opposition to motion for prelim. injunc. appendix thereto, affidavit of Constance B. Newman, affidavit Sheldon Butts.

DATE	NR.	PROCEEDINGS
7/11/75		Order on paper #34 signed 7/11/75 Latchum J. (Notice to counsel Mr. Moore.)
7/15/75	#38	Lg. sealed envelope w/exhibits of and deposition of Robert Northedge, Consumer Products Safety Comm.—2 vol. 5/29/75 and 5/30/75.
7/18/75	#40	Joint memo. of GTE Sylvania and Aeronutronic Ford in opposition to defts'. motion for summary judgment & reply to defts'. memo. in opposition to pltfs'. motion for prelim. injunc.
7/18/75	#41	Sealed envelope containing Exhibit P-2 to deposition of Robert Northridge.
7/23/75	H.	Hearing Latchum J. re deft's motion for prelim. injunc. Decision CAV.
10/23/75	#43	OPINION Latchum J. (Notice and copies to counsel.)
10/23/75	#44	ORDER Latchum J. issuing prelim. injunc. enjoining deft. from disclosing information (Notice and copies to counsel.)
12/19/75	#45	Govt's. notice of appeal.
1/19/76	E.	Exit complete record on appeal to Clerk 3rd CCA. (Notice to counsel.)
1/30/76	#46	Stipln. and ORDER Latchum J. sub. Matsushita Electric Corp. of America, a Delaware Corp. as party pltf. in place of Matsushita Elec. Corp. of America, a N.Y. Corp. (Notice to counsel.)
5/10/76	#47	Cert. copy from Clerk 3rd CCA order granting dismissal of appeal.
8/20/76	#49	ORDER Latchum J. Clerk to close this case for statistical purposes; not to be considered dismissal any part may initiate further proceedings if necessary (Notice and copies to counsel by Court.)
7/11/77	C.	Conf. Latchum J. re status.

DATE	NR.	PROCEEDINGS
7/13/77	#51	Pltfs'. motion for perm. injunc.
7/15/77	#52	ORDER Latchum J. setting trial 9/12/77; pretrial 9/2/77 at 11 a.m.; discover complete by 8/26/77. (Notice and copies to counsel.)
7/29/77	#53	Defts'. notice and motion to vacate order fixing pretrial conf. and trial w/proposed order.
7/29/77	#54	Defts'. memo. in support of motion to vacate.
7/29/77	#55	Defts'. motion to transfer to Dist. of Columbia w/proposed order.
7/29/77	#56	Defts'. memo. in support of motion to transfer.
8/1/77	#57	Defts'. memo. in opposition to motions for perm. injunction.
8/2/77	#59	ORDER Latchum Ch. J. requiring Briefing and/or affidavit scheduled (notice & copies to counsel)
8/4/77	#60	Pltf's. Memorandum in opposition to Deft's. Motion to vacate order fixing pretrial conference and Trial.
8/4/77	#61	Pltf's. Memorandum in Opposition to Motion to Transfer.
8/5/77	#62	Pltf's. GE Memorandum in Opposition to Motion to vacate order fixing P/T & Trial.
8/5/77	#62A	Pltf. Gen. Elec. memorandum in opposition to Govt's motion to transfer.
8/8/77	#63	Pltf's. requests for admissions.
8/8/77	#64	Pltfs. GTE & Aeronutronic Ford Corp's notice & motion to shorten time within which defts. may have to respond to requests for admissions. W/proposed order thereon.
8/8/77	#65	Admiral Corp.'s joinder in memoranda.

DATE	NR.	PROCEEDINGS
8/8/77	#66	Warwick Electronics, Inc.'s opposition to motion to vacate order fixing P/T conf. and trial and to motion to transfer.
8/9/77	#67	Motorola, Inc.'s response to motion to transfer. (deft's motion)
8/9/77	#68	Teledyne Mid-America Corp's response to deft's. motion to transfer.
8/9/77	#69	Matsushita Electric Corp's response to deft's. motion to transfer.
8/9/77	#70	Sharp Electronics Corp's response to deft's. motion to transfer.
8/9/77	#71	Toshiba America, Inc.'s response to deft's. motion to transfer.
8/15/77	#73	Defts'. oppos. to pltfs. GTE Sylvania and Aeronutronic Ford's motion to shorten time.
8/15/77	#74	Defts'. notice of depos. of GTE Sylvania 8/22/77.
8/15/77	#75	Defts'. reply memo. to pltfs'. oppos. to defts'. motion to transfer.
8/15/77	#76	Defts'. reply memo. to pltfs'. oppos. to defts'. motion to vacate P/T Conf. & trial.
8/16/77	#77	Pltfs'. response to defts'. oppos. to motion to shorten time.
8/18/77	#78	ORDER Latchum J. setting arg. 9/2/77 at 11 a.m. (Notice and copies to counsel.)
8/22/77	#79	Govt's. motion to vacate prelim. injunc. w/proposed order.
8/22/77	#80	Govt's. motion for summary judgment w/affidavit of Constance B. Newman, Sheldon Butts.
8/22/77	#81	Govt's. memo. in support of defts'. motions to vacate orders, etc.

DATE	NR.	PROCEEDINGS
8/31/77	#85	Suppl. to defts'. motion to transfer w/attachments.
9/1/77	#86	Motion of GTE Sylvania and Aeronutronic Ford for summary judgment.
9/1/77	#88	Affidavit of James M. McHaney, Jr.
9/1/77	#89	Memo. of GTE and AERONUTRONIC in support of motion for summary judgment.
9/2/77	H. H. Latchum Ch J	re pltf's. GTE & A-Ford's motions to shorten time on discovery and for summ. jdgt; & defts'. motions to transfer & to vacate Court's Order setting Trial Date. Dec. Granted motion to vacate trial date & pltf's motion to consolidate for trial purposes, CAV on motion to transfer & res dec on summ. jdgt.
9/6/77	#91	ORDER LATCHUM Ch J granting deft's vacating trial date, denying deft's. motion to shorten time, reserving dec. on motion to transfer & delaying dec. on GTE & A-Ford's motion for summ. jdgt; Consolidating the 12 cases for trial and all other purposes. (Notice & copy to counsel.)
9/8/77	#93	Defts'. response to pltf's. GTE Sylvania and Aeronutronic Ford's rqsts./admission.
9/12/77	#94	Dist. of Columbia Court of Appeals stay of mandate.
9/12/77	#95	Motion of Warwick Electronics, Inc., for summary judgment, w/affidavit of Howard M. Berg and proposed order.
9/12/77	#96	Warwick's joinder in memo.
9/12/77	#98	Affidavit of James M. McHaney, Jr.
9/15/77	#100	Memo. OPINION Latchum J. (Notice and copies to counsel.)
9/15/77	#101	ORDER Latchum J. denying defts'. motion to transfer; motion and brief sch. set; arg. set 10/28/77 at 11 a.m. (Notice and copies to counsel.)

DATE	NR.	PROCEEDINGS
9/15/77	#102	Motion of Admiral Corp. for summary judgment.
9/21/77	#105	Motion of Motorola, for summary judgment.
9/21/77	#106	Motion of Matsushita Electric, Sharp Electronics and Toshiba for sum. judgment.
10/5/77	#107	Govt's. notice of intention to make public Harwood Report, "Analysis of Subpoenaed Television Date" 9/23/77.
10/7/77	#108	Suppl. state. in oppos. to deft's. motion to vacate prelim. injunc. & in oppos. defts. motion sum. jdgmnt. Sealed. (GTE and Aeronutronic Ford.)
10/7/77	#109	(GTE & Aeronutronic Ford) Pltf's. memo. in oppos. to defts'. motion to vacate prelim. injunc., etc.
10/7/77	#110	Affidav. of James M. McHaney, Jr.
10/7/77	#111	Defts'. memo. in oppos. to pltf's. motion for summary jdgmnt.
10/7/77	#112	GE's memo. in oppos. to defts'. motion for sum. jdgmnt. and vacate prelim. injunc.
10/7/77	#113	Motorola, Sharp, Toshiba's memo. in oppos. to defts'. motion for sum. jdgmnt. and vacate prelim. injunc.
10/7/77	#114	Matsushita's memo. in oppos. to defts'. motion for sum. judgment.
10/17/77	#115	Certain pltf's. response to defts'. Notice to the Court re Harwood report.
10/21/77	#118	Defts'. reply to pltf's. oppos. to motions to vacate orders prelim. injunc. & motion for summary judgment.
10/21/77	#119	GTE's reply memo. to defts'. oppos. to motions for sum. jdgmnt.
10/21/77	#120	Pltf. General Elec.'s reply to defts'. oppos. to motion for sum. jdgmnt.

DATE	NR.	PROCEEDINGS
10/21/77	#121	RCA's reply memo. to defts'. oppos. to motions for sum. jdgmnt.
10/27/77	#123	GE's rqst. for leave to file response to defts'. reply. w/response.
10/28/77	H	Hearing Latchum J. re cross-motions for sum. jdgmnt. CAV.
12/8/77	#125	OPINION LATCHUM Ch J. (Notice & copies to counsel).
12/8/77	#126	JUDGMENT & PERMANENT INJUNCTION LATCHUM Ch J ordered that summary judgment is entered in favor of pltf's and against the defts., Deft's motion to vacate the outstanding prelim. injunction & for summary judgment is denied; defts its members etc are enjoined from disclosing to the public certain information pertaining to safety standards. (Notice & copies to counsel w/extra copies for US Atty Gen.)
12/19/77	#127	Govt's. notice and motion to alter/amend jdgmnt; proposed order.
12/19/77	#128	Govt's. memo. in support of motion to alter/amend jdgmnt.
12/22/77	#129	ORDER Latchum J. denying defts'. motion to alter or amend judgment. (Notice and copies to counsel.)
2/9/78	#130	At 3:59 P.M. notice of APPEAL filed by defts.
3/13/78	E	Exit record on appeal to Clerk 3rd CCA. (notice to counsel.)
4/30/75	#1	Complaint. Summons issued. (Exit to Marshal.)
4/30/75	#2	Pltf's. notice and motion for preliminary injunction.
4/30/75	#3	Pltf's. application for temporary restraining order.

DATE	NR.	PROCEEDINGS
4/30/75	H	Hearing Stapleton J. re T.R.O. GRANTED.
5/1/75	#5	Notice of Assignment of J. (Latchum). Notice to Counsel.
5/14/75	C	Conf. Latchum J. Arg. 7/16/75 at 11 a.m.
5/29/75	#6	Order Latchum J. consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 135, 136 for discovery, brief sch. etc. Arg. July 23 '75 at 11:00 AM.
5/29/75	#7	ANSWER.
4/30/75	#1	Verified complaint. Summons issued. (Exit writ to Marshal.)
4/30/75	#2	Application by pltf. for T.R.O.
4/30/75	#3	Pltf's. application for preliminary injunction.
4/30/75	H	Hearing Stapleton J. re T.R.O. GRANTED.
5/1/75	#5	Notice of Assignment of J. (Latchum). Notice to Counsel.
5/14/75	C	Conf. Latchum J. Arg. 7/16/75 11 a.m.
5/29/75	#6	Order Latchum — consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery, brief sch. etc. Arg. July 23 '75 at 11:00 AM.
5/29/75	#7	ANSWER
5/29/75	#1	Certified copy of consent ORDER Knapp J of transfer from S.D. of New York; with letter Deputy Clerk copy of docket entries & civil cover sheet.
/ /75	#2	VERIFIED COMPLAINT.
/ /75	#4	CONSENT ORDER KNAPP J that deft's are restrained & enjoined for a period of (60) days from date of this order.
5/29/75	#5	Pltf's notice & motion for a preliminary injunction.
5/30/75	#6	ANSWER.

DATE	NR.	PROCEEDINGS
6/5/75	#9	Notice of Assignment of J. (Latchum). Notice to Counsel.
6/25/75	#20	ORDER Latchum J. that restraining order entered herein by N.Y. Court shall remain in effect until further order of this Court. (Notice and copies to counsel.)
6/25/75	#21	ORDER Latchum J. consolidating this case w/75-104, 108, 112, 113, 114, 115, 116, 122, 131, 136, 150 and 152; to captioned In re: Consumer Product Safety Commission Litigation; terms of aforesaid Order re presentation of Motions for Prelim. Injunction to be binding. (Notice and copies to counsel by Court.)
/	/75	#1 Certified copy of Consent ORDER KNAPP J of transfer from S.D. of New York; with letter deputy clerk, copy of docket entries and civil cover sheet.
/	/75	#2 COMPLAINT.
/	/75	#4 CONSENT ORDER KNAPP J that defts are restrained & enjoined for a period of (60) days from date of this order etc.
/	/75	#5 Pltf's notice & motion for a preliminary injunction.
/	/75	#7 ANSWER
/	/75	#8 ORDER Latchum J. consolidating this action with 75-104, 108, 112, 113, 114, 115, 116, 122, 131, 136, and 150 as per order 5/29/75. (Notice to counsel.)
/	/75	#9 Notice of Assignment of J. (Latchum). Notice to Counsel.
/11/75	#10	ORDER Latchum J. that restraining order entered herein by N.Y. Court remain in effect until pltf's. motion for prelim. injunction is determined or until further Order of the Court. (Notice and copies to counsel.)

DATE	NR.	PROCEEDINGS
/16/75	#1	Certified copy ORDER Foley J. of transfer from Northern Dist. of N. Y.; temporary restraining ORDER Foley J.; ORDER Foley J. to show cause; affidavit of Fred R. Wellner; application for order to show cause & temporary restraining order.
/16/75	#2	Verified complaint for injunction & declaratory judgment.
/20/75	#4	Notice of Assignment of J. (Latchum). Notice to Counsel.
/29/75	#5	Order Latchum J. consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery, brief sch. etc. July 23 '75 at 11:00.
/29/75	#6	ANSWER
/13/75	#1	Complaint for preliminary and permanent injunction, declaratory judgment and application for temporary restraining order, w/affidavit of Robert F. Stewart, Pres. Admiral Corp., and/ORDER Snyder J. granting temporary restraining order.
/13/75	#3	Consent ORDER Snyder J. transferring this action to Dist. of Dela.
3/13/75	#4	Notice of Assignment of J. (Latchum). Notice to Counsel.
5/14/75	C.	Conf. Latchum J. Arg. set 7/16/75 at 11 a.m.
5/29/75	#5	Order Latchum J. consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery, brief sch. etc. Arg. July 23 '75 at 11:00.
5/29/75	#6	ANSWER
/29/75	#1	Certified copy ORDER ON CONSENT KNAPP J of transfer from S.D. of New York; with letter of Deputy clerk, copy of docket entries & civil cover sheet.
/	/	#2 VERIFIED COMPLAINT.

DATE	NR.	PROCEEDINGS
/ /	#4	Pltf's notice & motion for a preliminary injunction.
5/29/75	#5	Consent ORDER KNAPP J temporary restraining deft's & enjoined for a period of (60) days from the date of this order or the date of determination of pltf's motion for a preliminary injunction.
5/30/75	#7	ANSWER.
6/5/78	#8	ORDER Latchum J. consolidating this action with 75-104, 108, 112, 113, 114, 115, 116, 122, 131 and 136 as per Order 5/29/75. (Notice to counsel.)
6/5/75	#9	ORDER Latchum J. that restraining order entered by N.Y. Court shall remain in effect until this Court has determined pltf's. motion for prelim. injunction or until further order of this Court. (Notice to counsel.)
6/5/75	#10	Notice of Assignment of J. (Latchum). Notice to Counsel.
/30/75	#1	Complaint. Summons issued. (Exit writ to Marshal.)
/30/75	#2	Pltf's. motion for preliminary injunction.
/30/75	#3	Pltf's. notice and motion for T.R.O.
/30/75	#4	Affidavit of Joseph R. Haack in support of motion for T.R.O. and Prelim. Injunction.
/30/75	H	Hearing Stapleton J. re T.R.O. GRANTED.
/1/75	#6	Notice of Assignment of J. (Latchum). Notice to Counsel.
/14/75	C	Conf. Latchum J. Arg. 7/16/75 at 11 a.m.
/29/75	#7	ORDER LATCHUM J consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery brief sch etc. Arg. July 23 '75 at 11:00 am. (Notice to counsel)
/29/75	#8	ANSWER.

DATE	NR.	PROCEEDINGS
/28/75	#1	Complaint. Summons issued. (Exit writ to Marshal's office).
/28/75	#2	Application for T.R.O.
/28/75	#3	Notice and motion for preliminary injunction.
/19/75	C	Conf. Stapleton J. re T.R.O.
/29/75	#5	Temporary Restraining Order Stapleton J. (Service by Marshal)
/29/75	#6	Pltf's. suppl. affidavit in support of pltf's application for T.R.O. and motion for preliminary injunction. (Affidavit of Philip Curtis, Esq.)
/13/75	#7	Notice of Assignment of J. (Latchum). Notice to Counsel.
/14/75	C	Conf. Latchum J. Arg. 7/16/75 at 11 a.m.
/29/75	#9	ORDER LATCHUM J consolidating cases CA 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery, brief, etc. Arg. July 23 '75 at 11:00 AM. (Notice to counsel)
/29/75	#10	ANSWER.
/22/75	#1	Complaint. Summons issued. (Exit writ to Marshal.)
/22/75	#2	Pltf's. motion for preliminary injunction, w/proposed order for hearing on prelim. injunction.
/23/75	H	Hearing Latchum J. re T.R.O. Granted.
/24/75	#4	Notice of Assignment of J. (Latchum). Notice to Counsel.
/14/75	C	Conf. Latchum J. Arg. 7/16/75 at 11 a.m.
/19/75	#6	ORDER LATCHUM Ch J consolidating the following cases C.A. 75-104, 108, 112, 113, 114, 115, 116, 122, 131 & 136 for discovery, briefs, etc. Arg. set Jul 23 '75 11:00 AM (Notice to counsel).

DATE	NR.	PROCEEDINGS
/29/75	#7	ANSWER.
/25/75	#1	Complaint. Summons issue. (Exit papers to Marshal.)
/25/75	#2	Pltf's. application for T.R.O.
/25/75	#4	Pltf's. notice and motion for preliminary injunction.
/25/75	#5	Affidavit of Samuel J. Rozel in support of motion for preliminary injunction or, in alternative, a temporary restraining order.
4/25/75	H	Hearing Latchum J. re T.R.O. GRANTED. (service of all papers to be made by US Marshal.
/13/75	#6	Notice of Assignment of J. (Latchum). Notice to Counsel.
/14/75	C	Conf. Latchum J. Arg. 7/16/75 11 a.m.
/29/75	#7	ORDER LATCHUM J consolidating cases C.A. 75-104, 108, 112, 113, 114, 115, 116, 122, 131, 136 for discovery, briefs, etc. Arg. set July 23 '75 at 11:00 am. (Notice to counsel)
/29/75	#8	ANSWER.

DATE	FILINGS—PROCEEDINGS
1978	
Mar. 21	Copy of Notice of Appeal, received February 15, 1978, filed.
	Record in D. C. Civil No. 75-104, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 13, 15, 16, 17, 18, 19, 24, 25, 26, 29, 35, 38, 41, 103, 104 & 108 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-108, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 9, 11, 12, 13, 14, 15, 16, 23, 29, 79 & 82 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-114, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS No. 10, 12, 13, 14, 15, 16, 22, 27, 29, 66 & 76 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-115, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 9, 11, 12, 13, 14, 15, 21, 26, 68 & 72 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-116, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 9, 11, 12, 13, 14, 15, 20, 21, 22, 25, 31, 88, & 92 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-131, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 9, 13, 14, 15, 16, 17, 22, 27, 73 & 75 "SEALED" IN U.S.C.A. SAFE].
	Record in D. C. Civil No. 75-136, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 9, 11, 12, 13, 14, 15, 16, 21, 26, 28, 77 & 80 "SEALED" IN U.S.C.A. SAFE].

DATE FILINGS—PROCEEDINGS

1978

Record in D. C. Civil No. 75-150, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 11, 13, 14, 15, 16, 17, 22, 27, 28, 71 & 73 "SEALED" IN U.S.C.A. SAFE].

Record in D. C. Civil No. 75-151, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 10, 12, 13, 14, 15, 16, 23, 28, 71 & 73 "SEALED" IN U.S.C.A. SAFE].

Record in D. C. Civil No. 75-152, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 11, 13, 14, 15, 16, 17, 23, 28, 73 & 74 "SEALED" IN U.S.C.A. SAFE].

Record in D. C. Civil No. 75-112, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 10, 12, 13, 14, 15, 16, 22, 27 & 79 "SEALED" IN U.S.C.A. SAFE]

Record in D. C. Civil No. 75-113, received March 15, 1978, filed. [ENTIRE RECORD IN EXHIBIT ROOM] [PAPERS NO. 12, 14, 15, 16, 17, 18, 25, 30, 78 & 83 "SEALED" IN U.S.C.A. SAFE].

May 3 Order (*Clerk*) granting appellant's motion for leave to extend time to file brief and the appendix to May 31, 1978, with NO FURTHER EXTENSIONS, filed.

May 31 Brief for appellants, rec'd. June 5, 1978, filed. (25 cc.). Certificate of service by mail on May 31, 1978 appears on Pages 37, 38 and 39.

May 31 Appendix (Vols. I, II & III), rec'd June 5, 1978, filed. (10 cc.). VOL. III HELD IN U.S.C.A. SAFE pending disposition of motion to impound that volume only. See order 6. Motion granted.

DATE FILINGS—PROCEEDINGS

1978

June 5 Order (*Seitz*, Ch.J. and *Gibbons*, C.J.) granting motions of Consumers Union of the United States, Inc., Consumer Federation of America and Public Citizen's Health Research Group for leave to file briefs amici curiae; and denying the motions for other relief with respect to the schedule of briefing of the parties, without prejudice to further application to the panel to whom the case is referred on the merits, filed.

June 5 Brief for amici curiae, Consumers Union of the United States, Inc., and Public Citizen Health Research Group, rec'd May 3, 1978, filed. Service attached.

June 5 Brief for amicus curiae, Consumer Federation of America, rec'd June 2, 1978, filed. Service attached.

June 14 Order (*Clerk*) granting appellants' motion for leave to file Volume III of the appendix under seal, filed.

July 7 Letter by Clerk, dated July 7, 1978 to Irving R. Segal, Esq., counsel for appellees RCA Corporation, et al. granting request for reconsideration and granting extension of time for filing appellees brief to not later than August 14, 1978.

July 7 Letter by Clerk, dated July 7, 1978 to Harry L. Shnideman, Esq. and James M. McHaney, Jr., Esq., counsel for appellees GTE Sylvania, et al. advising that 40 day instead of 30 days extension of time granted to appellees RCA, et al. with brief to be filed not later than August 14, 1978 and advising that brief for appellees GTE Sylvania, et al. to be filed and served not later than August 14, 1978.

July 24 Order (*Weis* and *Higginbotham*, C.J.) granting request by appellee, Aeronutronic Ford Corporation to amend caption to reflect change of said appellee's name to *Ford Aerospace & Communications Corporation*, filed.

DATE FILINGS—PROCEEDINGS

1978

- Aug. 11 Brief for appellees, GTE Sylvania Inc. and Ford Aerospace & Communications Corp., received August 14, 1978, filed. Service by mail on 8/11/78 attached.
- Aug. 14 Brief for appellees, RCA Corporation, General Electric Co., The Magnavox Co., Zenith Radio Corp., Motorola, Inc., Warwick Electronics, Inc., Matsushita Electric Corp. of America, Admiral Corp., Sharp Electronics Corp. and Toshiba America, Inc., filed Certificate of service by mail on August 14, 1978 on last page of brief.
- Aug. 28 Consent motion by appellant for a 30-day extension of time to file reply brief to October 2, 1978, filed. (4cc) Service attached.
- Sept. 5 Above consent motion acted on as follows: Extension granted to September 28, 1978. *No further extensions.* Acting Clerk.
- Sept. 28 Reply brief for appellants, received October 2, 1978, filed. Service by mail on 9/28/78 attached.
- Oct. 13 Order (Clerk) denying appellant's motion to expedite oral argument as unnecessary, in light of the fact that this case will be listed at the earliest convenience of the Court because it involves the granting of injunctive relief, filed.
- Dec. 21 Letter dated December 18, 1978 from Mark N. Mutterperl, Esq., counsel for appellant, enclosing copy of Second Circuit opinion in *Pierce & Stevens Chemical Corp. v. United States Consumer Product Safety Commission*, received for the information of the Court.
- Dec. 28 Order dated December 27, 1978 (Seitz, Ch.J.) directing 30 minutes for appellant, 15 minutes for amicus curiae and 45 minutes for appellees, filed.

DATE FILINGS—PROCEEDINGS

1979

- Jan. 8 Argued. Coram: Seitz, Ch.J., Gibbons and Higginbotham, C.J.
- Feb. 2 Transcript of the oral argument in this Court on January 8, 1979, received at the direction of the Court, filed. (4cc)
- Apr. 30 Opinion of the Court (*Seitz*, Ch.J. and Gibbons and Higginbotham, C.J.), filed.
- Apr. 30 Judgment affirming in its entirety the judgment of the district court, filed December 8, 1977, with costs taxed against appellant, filed.
- May 11 Order (*Seitz*, Ch. J. and Gibbons and Higginbotham, C.J.) amending opinion, filed.
- May 22 Certified judgment in lieu of formal mandate issued.
- May 22 Records (separate in each Civil No. 75-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-131, 75-136, 75-150, 75-151 and 75-152) returned to Clerk of DC.
- May 24 Receipt for records (separate in each Civil No. 7-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-131, 75-136, 75-150, 75-151 and 75-152) rec'd from Clerk of DC., filed.
- July 25 Copy of letter dated July 23, 1979 to counsel for appellant advising that Supreme Court extended time for filing petition for writ of certiorari to and including August 28, 1979, received from Clerk of S.C.
- Aug. 24 Copy of letter dated August 22, 1979 to counsel for appellant advising that Supreme Court extended time for filing petition for writ of certiorari to and including September 27, 1979, received from Clerk of S.C.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF DELAWARE

Civil Action No.

GTE SYLVANIA INCORPORATED, PLAINTIFF

v.

CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, individually and in his capacity as Chairman of Consumer Product Safety Commission, BARBARA FRANKLIN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission, LAWRENCE KUSHNER, individually and in his capacity as a Commissioner of Consumer Product Safety Commission, CONSTANCE NEWMAN, individually and in her capacity as a Commissioner of Consumer Product Safety Commission, R. DAVID PITTLE, individually and in his capacity as a Commissioner of Consumer Product Safety Commission, SADYE DUNN, individually and in her capacity as Secretary of Consumer Product Safety Commission, and VINCE DE LUISE, individually and in his capacity as Freedom of Information Officer for Consumer Product Safety Commission, DEFENDANTS

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION

1. Plaintiff, GTE Sylvania Incorporated ("Sylvania"), is a corporation organized and existing under the laws of the State of Delaware.

2. Defendant, Consumer Product Safety Commission (the "Commission"), is an independent regulatory commission established pursuant to the Consumer Product Safety Act of 1972, 15 U.S.C. §§ 2051 *et seq.*

3. Defendants, Richard O. Simpson, Barbara Franklin, Lawrence Kushner, Constance Newman, R. David Pittle, Sadye Dunn, and Vince de Luise, are each members or employees of the Commission.

4. This court has jurisdiction of the subject matter of this Complaint pursuant to 5 U.S.C. §§ 702 and 704, 28 U.S.C. §§ 1331 and 1337, and 28 U.S.C. §§ 2201-2202.

COUNT ONE

5. On Friday, April 11, 1975, a letter dated April 8, 1975, was received at Sylvania's office in Batavia, New York, giving notice that the Commission had made a final decision to release accident and technical data which Sylvania submitted in response to a Special Order issued by the Commission on May 13, 1974, and additional data submitted in response to a subpoena *duces tecum* issued by the Commission on July 26, 1974.

6. By letter dated May 13, 1974, supplementing an earlier request for information in connection with public hearings on television safety, held on April 23 and 24, 1974, the Commission issued a Special Order to Sylvania and other manufacturers of television sets or components, requesting the submission of television-related accident data collected since 1969 hearings held by the National Commission on Product Safety, as well as certain technical and policy information concerning the present and future safety-related matters. A copy of the Commission's letter of May 13, 1974 together with its enclosure, the Commission's Special Order, are attached hereto as Exhibit A. In this letter, Defendant Simpson, Chairman of the Commission, gave express assurances that "This information will be received in confidence." In addition, Mr. Simpson stated that, in the event a demand were made by a third party under the Freedom of Information Act for disclosure of data submitted pursuant to assurances of confidentiality, the Commission would release the data only if it determined that "the most recent judicial interpretation" required disclosure. Finally, upon receipt of a disclosure request Sylvania "will be informed and given the opportunity to present additional information and views regarding the exempt status of the materials."

7. By letter dated May 28, 1974 to the Secretary of the Commission, Sylvania's attorney responded to the

Commission's "Special Order" by submitting certain data. Pursuant to the Chairman's written assurance of confidentiality, a specific request for confidential treatment of certain parts of the submission was made. This letter is attached hereto as Exhibit B.

8. Under a covering letter dated July 26, 1974, the Commission issued a subpoena *duces tecum* directing Sylvania to provide certain supplementary accident and technical data, "[t]o assist the Consumer Product Safety Commission in its investigation of shock and fire hazards associated with television receivers." A copy of the subpoena *duces tecum*, with covering letter and attachments are attached hereto as Exhibit C. Attached to the Commission's *duces tecum* was a sample accident report form referred to by the Commission for the purpose of illustrating the type of accident report the subpoena was intended to cover. This sample form made clear that the subpoena of the Commission sought documentation pertaining not just to actual, verified accidents, but also to "alleged incidents."

9. Sylvania submitted its response to the Commission's subpoena *duces tecum* on August 23, 1974. Counsel for Sylvania stated in a cover letter that Sylvania was submitting the documents "to be included in and treated as a part of [the Commission's] investigatory files in its television receiver fire and shock hazards investigation." The letter further stated that the material was of a proprietary nature, specifically referring to accident reports and "alleged incident" data, and requested that the documents be afforded confidential treatment "in accordance with the provisions of 5 U.S.C. Sections 552(b) (4) and (b) (7)." This letter is attached hereto as Exhibit D.

10. The materials submitted by Sylvania include all reports of incidents *allegedly* involving equipment failure. In reality many of these *alleged* incidents were not accidents resulting from equipment failure but rather reflect proper equipment functioning or equipment misuse. However, because the Commission's subpoena appeared to request production of all safety-related incident reports, all of this material was forwarded to the Commission.

11. By letter dated August 2, 1974, Defendant Dunn, Secretary of the Commission, notified Sylvania that the Commission had received requests from the Health Research Group and from Consumers Union for disclosure of the information submitted in response to the Commission's Special Order of May 13, 1974. The Secretary's letter requested that Sylvania substantiate any claim for confidentiality which it might have for any data submitted to the Commission voluntarily, in response to the Special Order, or in response to the Commission's subpoena issued July 26, 1974. The Secretary then stated,

"When our review is complete and prior to any disclosure of material claimed to be confidential, we will inform you which materials we consider to be discloseable notwithstanding your claim. At that time you will have an opportunity to determine whether or not you desire to appeal from this initial determination."

The Secretary's letter of August 2, 1974, together with its enclosures, is attached hereto as Exhibit E.

12. By letter dated August 29, 1974, Sylvania replied to the Secretary's request for claims and substantiation. This reply is attached hereto as Exhibit F. In this letter, Sylvania went into detail with respect to its basis for requesting confidential treatment for all television related accident/incident data, trade secrets, documents and data relating to product safety and reliability, and documents concerning product-related claims against Sylvania and product-related litigation files, submitted to the Commission pursuant to the Special Order and subpoena *duces tecum*. No further correspondence on this matter was received from the Commission until April 11, 1975.

13. Sylvania has never been notified by the Commission formally or informally, that any request has been filed with the Commission requesting disclosure of data submitted in response to the Commission's subpoena *duces tecum*. On information and belief, no such request for disclosure has been filed.

14. By letter dated April 8, 1975, which together with its enclosure is attached hereto as Exhibit G, Defendant De Luise, the Commission's Freedom of Information Officer, formally notified Sylvania of the Commission's *final* decision to release accident and technical data which Sylvania submitted in response to the Commission's Special Order and the Commission's subpoena. The letter states that the Commission had decided to release all accident and technical data submitted by Sylvania with the exception of (1) privileged legal correspondence, (2) accident data containing identifying details which might infringe the victim's personal privacy, and (3) certain unspecified technical data. The letter generally asserts that "accident data" is not "commercial information" within the meaning of the exemption provisions of section 552(b)(4) of the Freedom of Information Act. The letter also states that even if the information were within the statutory exception, the Commission had decided that it should be released "in the interest of the public health and safety."

15. On February 7, 1975, the Commission awarded a contract to a private company to produce a "computer extraction" of the accident/incident data submitted to the Commission by Sylvania and other manufacturers of television sets and components. Upon information and belief, this contractor completed this "computer extraction" around the end of March, 1975, and the "computer extraction," which identifies Sylvania, represents a portion of the data which the Commission intends to disclose.

16. While Sylvania has been able to obtain a copy of the "computer extraction" of Sylvania data, the Commission has not provided a description of the methodology used in its preparation. Consequently, given the present format of the "computer extraction," it is impossible for Sylvania to verify whether the statistical presentation contained in the "computer extraction" is accurate. Moreover, on information and belief, the Commission does not intend independently to verify the accuracy of this "computer extraction" before disclosing it to the public.

17. The computer extraction is styled "TV Accident Reports—Sequence Listing." This title takes no account of the fact that much of the data submitted in response to the Commission's request for reports of *alleged* accidents almost certainly reflects accidents resulting from causes other than equipment failure. However, the Commission has made no investigation to verify which of the "accidents" to be disclosed actually resulted from equipment failure. Consequently disclosure of this data in its present format will in effect represent to the public that *all* of the data submitted by Sylvania reflects actual, verified accidents, which is not the case.

18. The Freedom of Information Officer's letter of April 8, 1975, provided that the data would not be released for at least ten days after receipt of the notice. As authority for its ten-day release delay, the letter referred to the Commission's "Interim Freedom of Information Guidelines (16 CFR, Part 1015)." In fact, the Commission's "Interim Guidelines" are not part of the Code of Federal Regulations. The Commission has published a notice of proposed rules in the Federal Register, but the rules have not been formally adopted by the Commission and have not been published as rules in the Federal Register. The Commission has adopted no other Rules governing the disposition of disclosure requests made pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

19. As a "more complete discussion of the Commission's reasons for disclosing these data," the Freedom of Information Officer provided to Sylvania as an enclosure to his letter of April 8, 1975, (Exhibit G) a memorandum from the Commission's Office of General Counsel. The Freedom of Information Officer asserted that this memorandum "formed the basis for the Commission's decision." See Exhibit G. This memorandum discloses that the Commission intends to release data supplied by all other manufacturers in connection with the Commission's investigation. In addition the memorandum, on page 7, "recognizes" that release of the data as presently proposed would result in a distorted presentation of the relative accident rates of different manufacturers:

"some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases, i.e., a higher accident rate for one particular TV model than similar models because more complete records were maintained."

20. On April 17, 1975, counsel for Sylvania was advised informally by the General Counsel of the Commission that, in response to a request by another manufacturer, the Commission had decided to postpone the scheduled disclosure of data submitted by Sylvania and other manufacturers, as well as the "computer extraction" based upon this data, until May 1, 1975. On April 18, 1975, counsel for Sylvania received formal telegraphic notice from the Secretary of the Commission that disclosure was to be postponed until May 2, 1975. A copy of this telegram is attached hereto as Exhibit H.

21. In accordance with a recommendation contained in the staff memorandum submitted to the Commission, the Freedom of Information Officer's April 8 letter states that the problem of distortion posed by the disclosure of the data in its present form will be resolved as follows:

the Commission will accompany release of the accident data with a statement that the information could be misleading because some television manufacturers maintained more complete accident records than other manufacturers.

However such a statement would plainly be insufficient to cure the misleading character of the disclosure now contemplated in that: such a statement would not identify those manufacturers whose accident figures are inflated; nor would such a statement inform the public of the extent to which accident data for particular manufacturers is inflated relative to other manufacturers whose submissions were less comprehensive.

22. The basis for the Commission's decision that Sylvania's data "should be released in the interest of public health and safety," as set forth in the Freedom of In-

formation Officer's letter of April 8, is identified on page 5 of the attached staff memorandum: "the release of the accident data would assist consumers to better evaluate the safety of TVs." However, due to the concededly misleading nature of the disclosure the Commission now intends to make, disclosure would not in fact provide an accurate basis for comparative consumer decisions. On the contrary, such disclosure could well mislead the public into the selection of relatively less safe equipment.

23. The only official description of the data to be released is contained in the letter of April 8, 1975. However this letter does not provide Sylvania with adequate notice of the data which the Commission intends to disclose. It merely states that the Commission has decided to release all of the data with three vague and unspecified exceptions. Moreover, the letter does not identify the "computer extraction" as a portion of the proposed disclosure. Sylvania informally learned only several days after receiving the April 8 letter of the Commission's intention to disclose this "computer extraction." No opportunity whatever has been provided to Sylvania to submit comments to the Commission on its proposed release of this "computer extraction."

24. Despite the representation of the Commission that Sylvania would have an opportunity to determine whether or not to appeal to the Commission from an "initial determination" to disclose data submitted by Sylvania, the Commission's "Interim Guidelines" do not provide any method for appeal of an "initial determination" to disclose data provided to the Commission in confidence. In fact, Sylvania has not been provided an opportunity to appeal to the Commission from the initial determination of the Staff that Sylvania's confidential data should be disclosed.

25. Disclosure by Defendants of all or any portion of the data provided in confidence to the Commission by Sylvania and by other manufacturers of television sets or components is prohibited by the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1), which requires that the Commission shall assure that information to be disclosed shall be accurate and that disclosure be fair in the

circumstances and reasonably related to effectuating the purposes of the Act.

COUNT TWO

26. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

27. Disclosure by Defendants of all or any portion of the data provided in confidence to the Commission by Sylvania and by other manufacturers of television sets or components, in face of the Commission's concession that release of such data would be misleading, would be an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion.

COUNT THREE

28. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

29. Disclosure by Defendants of all or any portion of the data provided by Sylvania to the Commission in confidence on the ground that disclosure is required by the Freedom of Information Act, would constitute an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion because the data provided in confidence to the Commission by Sylvania is exempted from disclosure under the Freedom of Information Act by 5 U.S.C. § 552(b) (4).

COUNT FOUR

30. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

31. Disclosure by Defendants of all or any portion of the data provided by Sylvania to the Commission in confidence on the ground that disclosure is required by the Freedom of Information Act, would constitute an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion because the data provided in confidence to the Commission by Sylvania is exempted from disclosure under the Freedom of Information Act by 5 U.S.C. § 552(b) (7).

COUNT FIVE

32. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

33. Disclosure by Defendants of all or any portion of the data provided by Sylvania to the Commission in confidence is expressly prohibited by 18 U.S.C. § 1905.

COUNT SIX

34. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

35. Disclosure by the Defendants of all or any portion of the data submitted to the Commission in confidence by Sylvania would be an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion in that the Commission has failed to observe binding procedural requirements adopted by the Commission in connection with Sylvania's submission of data that require that an initial determination as to disclosure be made and that, prior to issuance of a final decision, Sylvania be afforded notice of the initial determination and an opportunity to appeal this determination to the Commission.

COUNT SEVEN

36. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

37. Disclosure by the Defendants of all or any portion of the data submitted to the Commission in confidence by Sylvania, without establishing and publishing rules of procedure and substantive rules of general applicability to govern the disposition of disclosure requests made pursuant to the Freedom of Information Act is in violation of 5 U.S.C. § 552(a) (1), (C), (D) and (E).

COUNT EIGHT

38. Sylvania realleges and incorporates by reference paragraphs 1 through 24 of Count One of this Complaint.

39. Disclosure by the Defendants of all or any portion

of the data submitted to the Commission in confidence by Sylvania in response to the Commission's subpoena *duces tecum* of July 26, 1974, would be an arbitrary and capricious exercise of their authority and an abuse of agency discretion, and a violation of the express provisions of the Consumer Product Safety Act, 15 U.S.C. § 2055(b), in that: no formal request for disclosure of this information has been lodged with the Commission; the Commission has failed to provide Sylvania with the necessary 30 days notice of its intention to make disclosure; the Commission has failed to provide Sylvania with an adequate summary of the information to be disclosed; and the Commission has failed to provide Sylvania with a reasonable opportunity to submit comments with respect to such disclosure.

PRAYER FOR RELIEF

40. Disclosure by Defendants to the public of all or any portion of the data previously submitted to the Commission in confidence by Sylvania and other manufacturers, or the "computer extraction" or any other similar statistical compilation based upon such data, would cause Sylvania immediate and irreparable injury for which there is no adequate remedy at law. Once released to the public, such data can never be recalled. Disclosure in the present concededly misleading form will adversely effect Plaintiff's competitive position and will subject Sylvania to unwarranted adverse publicity and litigation that may arise from improper inferences and conclusions which may be drawn from data to be disclosed. Moreover, such disclosure would make available to Sylvania's competitors sensitive trade secrets, confidential statistical data and confidential commercial information relating to Sylvania's processes, operations and style of work. Such disclosure will also injure Sylvania's goodwill and reputation with customers and consumers as a result of improper and inaccurate deductions which may be drawn from such misleading information, all to its substantial and irreparable injury.

WHEREFORE, the Plaintiff prays that this Court:

(1) Enter a judgment and decree pursuant to 28 U.S.C. §§ 2201-2202 declaring that disclosure of all or any part of the data provided to the Commission in confidence by Sylvania would be:

(a) in violation of 15 U.S.C. § 2055(b) (1) in that: information contained in the materials to be disclosed is inaccurate and misleading; and disclosure would not be fair in the circumstances or reasonably related to effectuating the purposes of the Consumer Product Safety Act;

(b) an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion, in that the Commission has determined that disclosure of the data as presently contemplated would be misleading;

(c) an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion in that such data is exempted from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b) (4) and (7);

(d) an arbitrary and capricious exercise of Defendants' authority and an unlawful abuse of agency discretion because such data was submitted pursuant to express and implied assurances of confidentiality to Sylvania by Defendants, and such disclosure is not required by the Freedom of Information Act, 5 U.S.C. 552(b) (4) and (7);

(e) in violation of 18 U.S.C. § 1905;

(f) an arbitrary and capricious exercise of Defendants' authority and an abuse of agency discretion in that Defendants have not afforded Sylvania an opportunity to appeal the disclosure determination of the Staff to the Commission in connection with Sylvania's submission of its data;

(g) in violation of 5 U.S.C. § 552(a) (1) (C-E);

(2) Enter a judgment and decree pursuant to 28 U.S.C. §§ 2201-2202 declaring that disclosure by Defendants of all or any portion of the data submitted to the Commission in confidence by Sylvania in response to the Commission's subpoena *duces tecum* of July 26, 1974, would be an arbitrary and capricious exercise of their authority, an abuse of agency discretion, and a violation of the express provisions of the Consumer Product Safety Act, 15 U.S.C. § 2055(b), in that: no formal request for disclosure of this information has been lodged with the Commission; the Commission has failed to provide Sylvania with the necessary 30 days notice of its intention to make disclosure; the Commission has failed to provide Sylvania with a reasonable opportunity to submit comments with respect to such disclosure.

(3) Enter a preliminary and permanent injunction pursuant to Rule 65, Federal Rules of Civil Procedure, restraining and enjoining Defendants, and each of them, and their successors in office, agents and employees of all other persons acting in concert or participation with them, from disclosing: (1) any and all documents and data provided to the Commission by Sylvania in response to the Commission's Special Order issued May 13, 1974, or in response to the Commission's subpoena *duces tecum* issued July 26, 1974; and (2) any "computer extraction" or other reports, compilations or summaries based upon such data from which Sylvania and/or any other manu-

facturer of television sets and/or components could be identified.

Respectfully submitted,

/s/ James M. Tunnell, Jr.
JAMES M. TUNNELL

/s/ William H. Sudell, Jr.
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EXHIBIT "A"

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

May 13, 1974

Dear Sir:

During the recent public hearing on television safety, the Electronics Industry Association presented aggregate statistics on plans to improve television safety. Although the presentation was informative, it was not responsive to the specific information which manufacturers were asked to present in advance of the hearing. The effort made by your company to supply TV safety data is most appreciated. However, all of the data requested were not submitted, and we would ask that you supply the required information even though part of it may duplicate your earlier submittal.

Therefore, pursuant to section 27(b)(1) of the Consumer Product Safety Act, the attached Special Order of the Commission sets out the information required and requests that it be submitted within two weeks of receipt of the Order.

We recognize that some of the information to be submitted may be proprietary. In this connection, section 6(a)(1) of the Act states,

"Nothing contained in this Act shall be deemed to require the release of any information described by subsection (b) of section 552, title 5 United States Code, or which is otherwise protected by law from disclosure to the public."

The section of the United States Code referred to contains the Freedom of Information Act as 5 U.S.C. 552 and exempts from disclosure by a federal agency.

"(b) matters that are—

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;...

(7) investigatory files compiled for law enforcement proposed except to the extent available by law to a party other than an agency."

In addition, section 6(a)(2) of the Act requires that the Commission keep confidential all information that it receives which relates to trade secrets or other matters referred to at 18 U.S.C. 1905.

You should indicate those submissions that you believe are entitled to exemption from disclosure under the provisions of the Freedom of Information Act. Information for which exempt status is claimed should be specifically identified and reasons given to substantiate the claim for exemption. This information will be received in confidence. It will not be placed in a public file and will not initially be made available to the public. If the Commission receives a request for production or disclosure of the information, a determination to release it would be based on the most recent judicial interpretation at the time the request is received and the applicable provisions of the Consumer Product Safety Act, the Freedom of Information Act, and 18 U.S.C. 1905. If such a request is received, you will be informed and given the opportunity to present additional information and views regarding the exempt status of the materials.

Thank you for your cooperation.

Sincerely,

/s/ Richard O. Simpson
RICHARD O. SIMPSON
Chairman

Enclosure

CONSUMER PRODUCT SAFETY COMMISSION
SPECIAL ORDER

(hereinafter referred to as the Company)

having been requested by the Consumer Product Safety Commission (hereinafter referred to as the Commission) to submit certain information in advance of a public hearing of the Commission held on April 23 and 24, 1974 to discuss shock and fire hazards associated with television receivers,

and

The Company, having elected not to respond to the Commission's request for such information, but instead adopting the industry-wide position of its trade association, the Electronic Industry Association (hereinafter referred to as EIA),

and

The Commission having concluded that the information submitted to the Commission by the EIA on behalf of the Company does not satisfy the Commission's request,

THE CONSUMER PRODUCT SAFETY COMMISSION HEREBY ORDERS THAT, with respect to—

(1) *TV-related accident data.* You are requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in the 1969 "Electronics Industry Ad Hoc Engineering Report on Television Fires" which was submitted to the National Commission on Product Safety, please indicate the procedures used.

(2) *Current, future-planned, and suggested TV-related safety standards.* Data are requested on (a) standards currently used in industry; (b) those planned for the near future, including effective dates; and (c) those suggested for future use. In particular, you are requested to indicate the implementation status of each safety standard improvement recommendation set forth in the

1969 "Electronics Industry Association Ad Hoc Engineering Report on Television Fires".

(3) *Quality control and quality assurance plans.* Data are requested on present, future-planned, and suggested techniques for controlling and assuring safety-related TV quality. Specific data in this area would be appreciated since we understand that the UL standard to which the industry subscribes does not include quality assurance guidelines.

(4) *Service techniques.* Data are requested on present and future-planned qualification requirements for TV service technicians.

(5) *Improvement plans for presently used TV sets.* Data related to reducing the incidence of fire and shock for existing TV sets are requested.

(6) *Specific technical areas.* Information on accident data, standards, etc. pertaining to the following specific manufacturing trends and design techniques are requested: (a) techniques for protection against overheating; (b) trends toward direct AC to DC chassis design; (c) trends toward use of compact portable TV sets and TV sets with thermoplastic enclosures; and (d) design and manufacturing techniques for minimizing dielectric stress on chassis components.

With respect to information not previously requested: Information is also requested as to standards adopted by the Company which exceeded Underwriters' Laboratories (UL) Standards, and also on tests used to assure compliance with such higher standards.

The Commission orders further that the information requested herein be submitted within two weeks of receipt of this Order.

/s/ Richard O. Simpson
RICHARD O. SIMPSON

EXHIBIT "B"

RUTH L. PROKOP
ATTORNEY AT LAW
Suite 900
1120 Connecticut Avenue
Washington, D.C. 20036

(202) 293-2300

May 28, 1974

Ms. Sayde Dunn
Secretary
Consumer Product Safety Commission
Washington, D.C. 20207

Re: *TV Safety Inquiry*

Dear Ms. Dunn:

On behalf of my client, GTE Sylvania, Incorporated, I am submitting the enclosed letter and certain Attachments pursuant to your request for additional information from individual manufacturers.

We respectfully call to your attention the proprietary nature of the Attachments entitled Product Safety Policy and Procedures (Attachment B), Engineering Checklist (Attachment C) and Product Safety Manual (Attachment D). Accordingly, we request that these documents be afforded confidential treatment in accordance with the provisions of 5 U.S.C. § 552(b)(4) and Section 6(a) of the Act.

Any questions with respect to this matter should be directed to Mr. Richard L. Sanderson at 700 Ellicott Street, Batavia, New York 14020, (716 343-3470) or to the undersigned at the above address.

Sincerely yours,

/s/ Ruth L. Prokop
RUTH L. PROKOP
Attorney for
GTE SYLVANIA, INCORPORATED

RLP:fms
Attachments

EXHIBIT "C"

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

July 26, 1974

Mr. Merle W. Kremer
President, Entertainment
Product's Group
GTE Sylvania Inc.
Entertainment Products Group
700 Ellicott Street
Batavia, New York 14020

Dear Mr. Kremer:

The Commission has reviewed your response to its May 13, 1974, Special Order requesting information on TV-related fire and shock hazards. Although we recognize your effort to comply with the terms of the Special Order, technical analysis shows that your response fails to provide sufficient information with respect to certain questions enumerated in the Order.

Accordingly, the Commission has decided to issue the attached subpoena, pursuant to section 27(b)(3) of the Consumer Product Safety Act, which specifies the additional information required.

It should be noted that failure to respond to the subpoena within the time specified therein may, pursuant to section 27(c) of the Act, lead to entry of a court order against you directing compliance with the Commission's subpoena.

Other parts of the Consumer Product Safety Act provide for additional sanctions. Section 19(a)(3) prohibits any person from failing or refusing to make reports or provide information required under the Act. Section 20 of the Act provides for the imposition of civil penalties computed on a daily basis, and section 22 provides for injunctive sanctions against any person who knowingly violates section 19 of the Act. Section 21 of the Act, moreover, provides for criminal penalties of fine and imprisonment under certain circumstances.

We would suggest that your response be sent to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207 by registered mail, return receipt requested.

Sincerely,

/s/ Sadye E. Dunn
SADYE E. DUNN
Secretary

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

Subpoena Duces Tecum

Mr. Merle W. Kremer
President, Entertainment
Products Group
GTE Sylvania Inc.
700 Ellicott Street
Batavia, New York 14020

To assist the Consumer Product Safety Commission in its investigation of shock and fire hazards associated with television receivers, you are hereby directed, as authorized by section 27(b)(3) of the Consumer Product Safety Act (15 U.S.C. 2076(b)(3)) to submit duplicate copies of the materials specified below which were not previously submitted in response to the Special Order of the Consumer Product Safety Commission, dated May 13, 1974, to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, within 14 days of receipt of the subpoena:

All TV-related accident reports collected since the 1969 hearings held by the National Commission on Product Safety. The term "reports", includes, but is not limited to, "all physical forms of: correspondence, letters; telegrams; cables; tapes *; recordings; photographs; films; memoranda, including writeups of telephone calls and other oral communications; press releases; bulletins; newspaper, magazine or other journalistic articles; diaries; charts; contracts; agreements; and any other writing prepared by any person or persons, including those by insurance firms, investigators, laboratories and researchers; and includes both originals and copies whether or not sent or received." The term "reports" includes those reports maintained on a form (sample attached) designed by members of the Electronics Industries Association (EIA) and submitted to the National Commission on Product Safety in November 1969 and also those reports

maintained on any and all forms substituted for the attached sample EIA form. (* See requirements for tape specifications attached.)

Records of standards adopted by the Company which exceed Underwriters Laboratories Standards, showing dates of adoption; texts; and specifications; including, but not limited to, diagrams, charts, drawings, and schematics. Records showing methods and instructions used to meet and maintain standards in excess of UL Standards, such as, texts of tests and inspections, and passing criteria, including all quantitative and qualitative tolerance ranges. The term "records" includes, but is not limited to, all manuals, brochures, pamphlets, bulletins, notes, memoranda, orders, and directives, including writeups of telephone calls and other oral communications.

Texts and specifications for suggested TV-related safety standards for future use. Records showing all intra-company discussions, suggestions and proposals concerning improved safety standards, whether or not finally approved by management. The term "records" includes, but is not limited to correspondence, letters, cards, notes, and memoranda, including writeups of telephone calls and other oral communications. (If your company does not have such data, please so state).

Texts and specifications for suggested safety-related quality control and quality assurance plans for future use, including, but not limited to, diagrams, charts, drawings, and schematics. Records showing all intra-company discussions, suggestions and proposals concerning techniques for improving future safety-related quality control programs and also safety-related quality assurance plans for implementing and monitoring such future quality control programs. The term "records" includes, but is not limited to, all manuals, bulletins, statements, notes, cards, and memoranda including writeups of telephone calls and other oral communications. (If your company does not have any or all of this data, please so state).

Records showing design techniques adopted to protect components, and assemblies against overheating, showing dates of adoption, texts and specifications, including diagrams charts, drawings and schematics. The term "rec-

ords" includes, but is not limited to, all manuals, brochures, pamphlets, bulletins, notes, memoranda, orders, and directives, including writeups of telephone calls and other oral communications.

Records showing design and manufacturing techniques adopted to minimize dielectric stress on chassis components, including descriptions of materials utilized and safety margins provided. The term "records" includes, but is not limited to, all manuals, brochures, pamphlets, bulletins, notes, memoranda, orders, and directives, including writeups of telephone calls and other communications.

BY ORDER OF THE COMMISSION:

In testimony whereof, the undersigned Secretary of the Consumer Product Safety Commission, has hereunto set her hand and caused the seal of said Consumer Product Safety Commission to be affixed at Washington, D.C. this 26th day of July 1974.

/s/ Sadye E. Dunn
SADYE E. DUNN
Secretary
Consumer Product Safety Commission

(File separate report for each incident)

Name of Manufacturer _____

Name of Private Label (if any) _____

Check Product Covered

Color TV _____ B&W TV _____

Year of Manufacture of Set _____

Model Number _____

Serial Number _____

Date of Alleged Incident _____

Nature of Alleged Incident (check each one applicable)

1. Personal Injury claimed _____
2. Set damaged beyond repair _____
3. Minor repairable damage to set _____
4. Other property damage claimed _____
5. Fire in set only _____
6. Fire other than set only _____
7. No damage to set _____
8. Smoke only _____

Apparent Cause of Incident _____

Information for this form furnished by:

1. Set owner _____
2. Dealer _____
3. Distributor _____
4. Manufacturer or private label _____

5. Independent service technician _____

6. Manufacturer affiliated repair technician _____

7. Other _____

1. The purported information in this form is based upon such reports as are available but in many cases will be incomplete, unverified and even incorrect. Such purported information is in no way to be used, directly or indirectly, even as prima facie evidence for any purpose of the alleged facts shown.
2. The manufacturer completing this form will retain it in a central location in its own files for a five year period to be available (a) only on demand by authorized government agencies and (b) subject to such conditions as agreed on in connection with meeting such demand.

ATTACHMENT

Specification for submission of data to the Consumer Product Safety Commission in magnetic tape or punch card file format.

TAPE FILE SPECIFICATIONS

- O unlabeled
- O 800 BPI density
- O odd parity
- O 9 track
- O IBM 2400 series tape drive compatible

TAPE RECORD SPECIFICATIONS

- O unblocked
- O EBCDIC code
- O description of record formats
- O description of symbolic coding schemes employed;
e.g., 1=male, 2=female, and 97=Maryland, etc.

PUNCH CARD FILE SPECIFICATIONS

- O 80 column punch cards

PUNCH CARD RECORD SPECIFICATIONS

- O Hollerith code
- O description of record formats
- O description of symbolic coding schemes employed

EXHIBIT D

RUTH L. PROKOP

ATTORNEY AT LAW

Suite 900

1120 Connecticut Avenue

Washington, D.C. 20036

(202) 293-2500

August 23, 1974

Ms. Sadye Dunn

Secretary

Consumer Product Safety Commission

1750 K Street, N.W.

Washington, D.C. 20207

Re: *TV Safety Inquiry*

Dear Ms. Dunn:

On behalf of my client, GTE Sylvania Incorporated (Sylvania), I am submitting the response to the Subpoena Decus Tecum issued by the Consumer Product Safety Commission (CPSC) on July 26, 1974 in connection with the above referenced investigation.

We respectfully call to your attention the proprietary nature of Items A-F submitted herewith including, but not limited to, information on accident reports and alleged incident data litigation files, various design techniques, etc. These documents contain sensitive commercial information which, if released, would be competitively damaging to Sylvania. Additionally, Sylvania is submitting these documents in response to the said Subpoena to be included in and treated as part of the CPSC's investigatory files in its television receiver fire and shock hazards investigation. Accordingly, we request that these documents be afforded confidential treatment in accordance with the provisions of 5 U.S.C. Sections 552(b)(4) and (b)(7).

I further direct your attention to the proposed rules recently issued by CPSC entitled "Procedures For Dis-

closure Or Production Of Information Under The Freedom Of Information Act" and specifically to Subpart C, "Disclosure Of Commission Accident Or Investigation Reports Under 15 U.S.C. 2074(c)", 39 FED. REG. 30298-30300, August 21, 1974. Section 1015.20 provides that no portion of Commission accident or investigation reports prepared by Commission employees will be subject to the exemptions contained in the Freedom of Information Act (Act). We understand that this *proposed* exemption from the Act refers only to reports prepared by Commission employees and not to reports submitted by individuals. Nonetheless, since we are today submitting sensitive commercial information including accident reports and alleged incident data, it should be noted for the record that such a proposed rule does not effect Sylvania's right to confidentiality under the Act. Any use of such information by Commission employees must be limited in accordance with prevailing standards of law (see, *Fisher v. Renegotiation Board*, 473 F.2d 109, (D.C. Cir., 1972)).

Any questions with respect to this matter should be directed to the attention of the undersigned at the above address.

Respectfully submitted,

/s/ Ruth L. Prokop
RUTH L. PROKOP
Attorney for
GTE Sylvania Incorporated

RLP:fms

Of Counsel:

Edward J. Goldstein
GTE Sylvania Entertainment Products Group
700 Ellicott Street
Batavia, New York 14020

EXHIBIT E

CONSUMER PRODUCT SAFETY COMMISSION Washington, D.C. 20207

Aug. 2, 1974

Mr. Merle W. Kremer, President
GTE Sylvania, Inc.
Entertainment Products Group
700 Ellicott Street
Batavia, New York 14020

Dear Mr. Kremer:

In accordance with our letter to you of May 13, 1974, this will notify you that we have received requests for disclosure of the information required by the Commission's Special Order of the same date. The requests were made by Consumers Union and the Health Research Group. You will note from the enclosed copies of our July 23, 1974, responses to these organizations that they have been made aware of the procedures for handling data that may be claimed to be confidential by the manufacturer.

The Commission recognizes its obligation under the Freedom of Information Act, 5 U.S.C. 552, to disclose all information which is not exempted from disclosure. Accordingly, if you claimed or intend to claim confidentiality for any data submitted to us voluntarily, in response to the Special Order, and/or in response to the Commission's subpoena issued July 26, 1974, you should submit information or additional information as you consider necessary to substantiate your claim. In particular, you should indicate whether the data is commercial data, and whether the release of this information would cause your company substantial harm in respect to your company's competitive position. The information to substantiate your claim should be submitted to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, not later than Friday, August 30, 1974.

You are advised, however, that a claim of confidentiality is not controlling upon the Commission. Rather, as explained in our letter of May 13, 1974, the Commission must independently determine whether the data claimed to be confidential commercial information is entitled to be treated as such under the Freedom of Information Act, and the appropriate case law. When our review is complete and prior to any disclosure of material claimed to be confidential, we will inform you which materials we consider to be disclosable notwithstanding your claim. At that time you will have an opportunity to determine whether or not you desire to appeal from this initial determination.

Sincerely,

/s/ Donald W. Johnson for
Sadye E. Dunn
Secretary

Enclosures (2)

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

July 23, 1974

David Charles Masselli, Esquire
Health Research Group
2000 P Street, N.W.
Washington, D.C. 20036

Dear Mr. Masselli:

This is in response to your letter of June 14, 1974 requesting that the Commission disclose the information submitted by television manufacturers in response to the May 13, 1974 Order of the Commission.

The Commission recognizes its obligation under the Freedom of Information Act, 5 U.S.C. 552, to disclose all records that are not exempt from disclosure. Therefore, as you know, the Office of the Secretary now has available for inspection and copying by the public all the information received from TV manufacturers for which no claims of confidentiality have been asserted. The Freedom of Information Act also provides that trade secrets and certain commercial or financial information may be exempt from public disclosure. Accordingly, certain categories of information submitted by the TV manufacturers were accompanied by assertions of confidentiality.

We enclose copies of the Commission Order of May 13, 1974 which lists the categories of information requested by the Commission as well as a covering letter which describes the procedure for handling information claimed to be confidential. The letter states that such materials would not initially be made available to the public and that the TV manufacturers would be informed if requests for disclosure are received. Therefore, the TV manufacturers who claim confidentiality will be informed of your request for disclosure in order to substantiate their claims for confidentiality.

The Commission intends to respond to your request for the TV data as expeditiously as technical analysis and

evaluation of the materials for withholding or disclosure will permit. Upon completion of our review, we will make available a description of the information for which confidentiality is claimed, and a list of those portions of the information which were found to be confidential. At that time, those concerned will have an opportunity to determine whether they desire to appeal this initial determination.

Sincerely

/s/ Sadye Dunn
SADYE E. DUNN
Secretary

Enclosures

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

July 23, 1974

Marsha N. Cohen, Esquire
Consumers Union
1714 Massachusetts Avenue
Washington, D.C. 20036

Dear Ms. Cohen:

This is in response to your letter of June 14, 1974 requesting that the Commission disclose the information submitted by television manufacturers in response to the May 13, 1974 Order of the Commission.

The Commission recognizes its obligation under the Freedom of Information Act, 5 U.S.C. 552, to disclose all records that are not exempt from disclosure. Therefore, as you know, the Office of the Secretary now has available for inspection and copying by the public all the information received from TV manufacturers for which no claims of confidentiality have been asserted. The Freedom of Information Act also provides that trade secrets and certain commercial or financial information may be exempt from public disclosure. Accordingly, certain categories of information submitted by the TV manufacturers were accompanied by assertions of confidentiality.

We enclose copies of the Commission Order of May 13, 1974 which lists the categories of information requested by the Commission as well as a covering letter which describes the procedure for handling information claimed to be confidential. The letter states that such materials would not initially be made available to the public and that the TV manufacturers would be informed if requests for disclosure are received. Therefore, the TV manufacturers who claimed confidentiality will be informed of your request for disclosure in order to substantiate their claims for confidentiality.

The Commission intends to respond to your request for the TV data as expeditiously as technical analysis and

evaluation of the materials for withholding or disclosure will permit. Upon completion of our review, we will make available a description of the information for which confidentiality is claimed, and a list of those portions of the information which were found to be confidential. At that time, those concerned will have an opportunity to determine whether they desire to appeal this initial determination.

Sincerely,

/s/ Sadye Dunn
SADYE E. DUNN
Secretary

Enclosure

EXHIBIT "F"

GTE SYLVANIA

[ILLEGIBLE]
President

August 29, 1974

Ms. Sadye Dunn, Secretary
Consumer Product Safety Commission
1750 K Street, N.W.
Washington, D.C. 20207

RE: CLAIM OF CONFIDENTIALITY/
GTE SYLVANIA INCORPORATED

Dear Ms. Dunn:

GTE Sylvania Incorporated (GTE Sylvania) hereby respectfully reiterates its claim for confidential treatment with regard to certain information submitted to the Consumer Product Safety Commission (the Commission) pursuant to the Commission's Special Order dated May 13, 1974 and the Commission's Subpoena Duces Tecum issued July 26, 1974. Said claims were contained in two letters filed with the Commission on May 28, 1974 and August 23, 1974, respectively (copies enclosed). Also, pursuant to the Commission's letter to GTE Sylvania, dated August 2, 1974, GTE Sylvania hereby further respectfully requests that confidential treatment be afforded to the Tallies of Accidents Allegedly Caused By Black & White and Color TV Receivers (Attachments A) submitted to the Commission pursuant to said Special Order on May 28, 1974 as well as to the information and data, for which confidentiality is otherwise claimed, contained in the transmittal letters accompanying GTE Sylvania's submissions made pursuant to said Special Order and Subpoena.

GTE Sylvania submits that the information for which confidential treatment is requested is exempt from disclosure pursuant to § 6(a) of the Consumer Product Safety Act as that Section embodies §§ 552(b)(4) and (7) of Title 5 of the United States Code. GTE Sylvania

further submits that certain of said information is of the type "not authorized by law" to be disclosed pursuant to § 1905 of Title 18 of the United States Code.

I. EXEMPTION 4

Section 553(b)(4) (hereinafter referred to as Exemption 4) makes the mandatory disclosure provisions of the Freedom of Information Act (FOIA) inapplicable to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential". The Senate Judiciary Committee Report on S.1160 (later enacted as Pub. L. 90-23) stated, in pertinent part, that Exemption 4:

"... is necessary to protect the confidentiality of information which is obtained by the Government ... but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists and manufacturing processes. It would also include information customarily subject to the ... lawyer-client privilege(s)." *

The House Committee on Government Operations viewed Exemption 4 broadly in its report on S.1160, which stated in pertinent part:

"It exempts ... material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales, statistics, inventories, customer lists, scientific or manufacturing processes or developments ... It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government." **

With respect to the specific types of information covered by Exemption 4, the Courts have proceeded on a case by

* See, S.Rept. No. 313, 89th Congress, 1st Sess. at 9 (1966).

** See, H.R. Rept. No. 1497, 89th Congress, 2d. Sess. at 10 (1966).

case basis. For example, in *Sterling Drug, Inc. v. FTC*, the Court held exempt business information such as market shares of certain products, dollar amounts of sales, and certain cost and profit data.* In the recent case of *National Parks and Conservation Association v. Morton*, the Court of Appeals for the District of Columbia Circuit recognized that the protection of Exemption 4 is based on more than mere mechanical categorization and reflects a strong public policy against disclosure that would in fact create the possibility of harm to "legitimate private or governmental interests in secrecy".** There the Court said that:

"... commercial or financial matter is 'confidential' for purposes of the exemption of disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained".***

Thus, bearing in mind the above statements of legislative intent and the D.C. Circuit Court's most recent formulation of the legal standard to be applied in cases involving Exemption 4, the business information for which GTE Sylvania has requested confidential treatment meets both the legislative and judicially fashioned criteria for Exemption 4 treatment:

A. TV-Related Accident/Incident Data Summaries and Supporting Documents.

The Summaries of incidents allegedly caused by GTE Sylvania receivers submitted to the Commission pursuant to the Special Order and the summary sheets of alleged fire and smoke reports, together with all supporting docu-

* *Sterling Drug, Inc. v. F.T.C.*, 450 P.2d 698 at 708 (D.C. Cir. 1971).

** No. 73-1033 (D.C. Cir., filed April 24, 1974) at 9.

*** Id at 10.

ments, submitted to the Commission pursuant to the Subpoena are information and documents that are proprietary to GTE Sylvania. The summary sheets specifically set forth data from which GTE Sylvania market share (market penetration) can be derived. This information is extremely confidential to GTE Sylvania and would not customarily be released to the public. This production volume information was released to the Commission only to aid the Commission in making meaningful use of the accident and incident data submitted therewith. Severe competitive harm could well result from public disclosure of GTE Sylvania's color television market share since competitive manufacturers could base marketing decisions on said information. Market share data is the type of information that has traditionally been granted exemption from disclosure.

Just as the report to the Commission of accident/incident data without correlation with production figures would render the data of little significance, the disclosure by the Commission of the raw data could render significant competitive harm by GTE Sylvania in the marketplace because said data alone is susceptible to severe misinterpretation. Also, it is important to note that said data is not released to the public by GTE Sylvania in the ordinary course of its business.

Further, the internal documents and correspondence which support and were the source of the data submitted to the Commission on the summary sheets is confidential to GTE Sylvania and deserve exempt treatment for the same reasons that the summary sheets should be afforded confidentiality.

Also, the consumer correspondence between GTE Sylvania and its customers which support the incident/incident data is treated in the highest confidence by GTE Sylvania; it was given to the Commission in confidence and should be so treated by the Commission. The disclosure of said correspondence would severely injure the reputation of GTE Sylvania. Consumers rightfully expect that correspondence sent and received by them will not be made public.

B. Trade Secrets, Business Methods and Safety Processes Relating to Product Safety and Reliability

The below described documents which were submitted to the Commission pursuant to its Special Order and/or Subpoena are proprietary and confidential to GTE Sylvania. These documents represent business methods and practices, safety procedures, patent application disclosures, component specifications and drawings, checklists to help assure that design intent is met, test methods and safety standards internal to GTE Sylvania, and each alone is integral to making GTE Sylvania television receivers safer consumer products. Thus, each is also an integral part of making GTE Sylvania receivers more reliable and competitive in the marketplace. None of these documents is customarily released by GTE Sylvania to the public, and disclosure by the Commission would mean the abrogation of a business method, business practice, trade secret, or safety related procedures or standard of GTE Sylvania. Each of these documents was evolved by Sylvania, many at great expense, and represent an efficient, effective way of meeting safety and reliability goals. Since efficiency and reliability translate quickly into competitive factors in the marketplace, the disclosure of any of these documents could well mean the loss to GTE Sylvania of a competitive advantage, and in the television industry, the loss of any competitive advantage will work substantial harm.

1. PRODUCT SAFETY POLICY AND PROCEDURES: This document sets forth GTE Sylvania's business method of meeting its safety requirements and includes specific manpower responsibilities. Also, it sets forth the procedures for implementing safety goals by the design, component procuring and quality assurance departments of GTE Sylvania.

2. ENGINEERING CHECKLIST/DESIGN CHECKLIST: These are detailed guidelines used by engineering design personnel to assure that GTE Sylvania engineering prototypes meet GTE Sylvania engineering design intent.

3. **PRODUCT SAFETY MANUAL:** This document sets forth internal requirements for safety of GTE Sylvania products which exceed Underwriter's Laboratories Standards, which requirements make GTE Sylvania products safer and more reliable.

4. **PRODUCT SAFETY TEST PROCEDURES:** This document sets forth step-by-step instructions on how to conduct the various GTE Sylvania safety tests for both UL and internal standards. The document also includes data sheet forms on which test results are recorded.

5. **COMPONENT SPECIFICATIONS:** These documents include drawings and/or specifications of certain components used in the manufacture of GTE Sylvania products. The drawings are given to vendors on a confidential basis to manufacture said components for GTE Sylvania.

6. **DESIGN STANDARDS FOR HANDLE, CART/STAND:** These documents set forth the test method used by GTE Sylvania to assure the integrity of handles as a component of the TV receiver and to assure the strength and stability of carts and stands. Both methods reflect internal procedures over and above UL Standards.

7. **CRITICAL LEAD DRESS INSTRUCTIONS:** These documents assure that in the manufacturing process, certain components are dressed in a way to prevent malfunctions caused by overheating of those components.

8. **PATENT APPLICATION DISCLOSURES:** These documents, which include trade secrets, are the basis of patent applications currently pending and filed with the U.S. Patent Office under docket Nos. D-7499, D-7908, D-7890, D-7110, D-7483, D-7111, and D-7717. The U.S. Patent Office is affording confidential treatment to those applications.

C. *Consumer Correspondence, Correspondence and Documents Relating to Claims Against GTE Sylvania and Litigation Files*

The documents submitted to the Commission pursuant to its Subpoena supporting the Summaries of Accidents Allegedly Caused by Television Receivers were gathered primarily from consumer correspondence, insurance and claim, and litigation files. Many of these documents relate to present or potential litigation, and those documents, except for documents which are of public records, should be considered privileged documents contained in an attorney's work file. Further, documents which are sent to GTE Sylvania by its outside counsel or by or to GTE Sylvania in-house counsel with regard to litigation or potential litigation cases should be afforded confidential treatment under Exemption 4 pursuant to the attorney-client privilege. These documents, treated by GTE Sylvania in the highest confidence, are not released to the public in the ordinary course of GTE Sylvania's business and in addition to the reasons set forth in Paragraph A, above, should be treated as confidential by the Commission pursuant to Exemption 4.

II. *Exemption 7*

Section 552(b)(7) of the FOIA (hereinafter referred to as Exemption 7) makes the disclosure provisions of the Act inapplicable to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency". The scope of the exemption was broadly construed in the House Report on S.1160, which stated that the exemption "covers investigatory files related to *all kinds of laws*, labor and securities laws as well as criminal laws."* (Emphasis added). In addition, the Circuit Court for the District of Columbia has recently established a test for non-disclosure under Exemption 7. In *Ditlow v. Volpe*** plaintiffs sought disclosure of correspondence between the

* See, H.R. Rept. No. 1497, 89th Cong. 2d. Sess. at 11 (1966).

** 362 F.Supp. 1331 (D.D.C. 1973).

National Highway Traffic Safety Administration and certain automobile manufacturers related to a pending safety defect investigation. The District Court ordered disclosure of the correspondence on the ground that application of Exemption 7 required a showing "that disclosure of the files sought is likely to create a concrete prospect of serious harm to law enforcement efficiency" and that since the date had been submitted by the party under investigation, disclosure thereof would raise none of the problems normally associated with such disclosure, such as revealing the identity of confidential sources and so on. The Circuit Court reversed and held the correspondence connected with the pending safety defect investigation to be within Exemption 7, holding that "if the documents in issue are clearly to be classified as 'investigatory files compiled for law enforcement purposes', the exemption attaches and it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured by revelation in the particular case." *

Surely the information submitted to the Commission by GTE Sylvania is being compiled in connection with a pending safety investigation undertaken for law enforcement purposes and, under the rule enunciated by the Circuit Court in *Ditlow*, falls within Exemption 7.

III. CPSC "Guidelines"

Finally, the Commission's proposed "Procedures for Disclosure or Production of Information under 'Freedom of Information Act' ** and the statutory provision on which they are based provide no legal basis for the disclosure of the information submitted by GTE Sylvania. Section 25(c) of the Consumer Product Safety Act *** provides that ". . . notwithstanding Section 6(a)(1),

* See, *Ditlow v. Brinegar*, 494 F.2d 1073 at 1074 (D.C. Cir. 1974).

** 39 FED. REG. 30298 (1974).

*** 15 U.S.C. § 2074(c).

. . . accident or investigation report made under this Act by an officer or employee of the Commission shall be made available to the public . . ." (Emphasis added). Section 6(a)(1) of the Act provides that "Nothing contained in this Act shall be deemed to require the release of any information described by Subsection (b) of Section 552, Title 5, United States Code, or which is otherwise protected by law from disclosure to the public.* These two provisions, read together, clearly distinguish between information exempt from disclosure under § 552(b) of the FOIA and accident or investigation reports made by agency officers clearly subject to mandatory disclosure. This distinction was recently reiterated in *Fischer v. Renegotiation Board* ** where the court held that agency reports and opinions derived from the agency's own analysis of otherwise exempt data were themselves subject to mandatory disclosure under § 552(a)(2)(A) of the FOIA.

The Commission's proposed guidelines for disclosure are thus properly interpreted as requiring only the disclosure of accident and investigation reports made by Commission officers, assuming that such reports do not themselves contain the kind of identifiable raw data submitted by GTE Sylvania.

* 15 U.S.C. § 205(a)(1) (Emphasis supplied).

** 355 F.Supp. 1171 (D.D.C. 1973).

Conclusion

For the foregoing reasons and the others previously advanced GTE Sylvania respectfully submits that the information it has submitted in response to the Commission's Special Order and Subpoena Duces Tecum should be granted confidential treatment under the Freedom of Information Act.

Respectfully submitted,

/s/ Edward J. Goldstein
EDWARD J. GOLDSTEIN
Attorney for
GTE Sylvania Incorporated
Entertainment Products Group

EJG:tr

Of Counsel:

Ruth L. Prokop
General Telephone & Electronics Corporation
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

EXHIBIT "G"

April 8, 1975

Mr. Merle W. Kremer
President, Entertainment Products
Group
GTE Sylvania Inc.
Entertainment Products Group
700 Ellicott Street
Batavia, New York 14020

Dear Mr. Kremer:

This is to formally notify you of the Commission's final decision to release accident and technical data which your company submitted in response to the Commission's special order of May 13, 1974, and/or the Commission's subpoena of July 26, 1974. Some of this information was claimed to be of a confidential nature.

The Commission has decided to release all accident and technical data with the exception of the following categories of information:

- (1) accident data in the form of legal correspondence which by its nature is privileged because it is within the attorney-client relationship or the attorney work product doctrine;
- (2) accident data which contain the names and addresses of accident victims or other information, the release of which might result in a invasion of an individual's personal privacy;
- (3) technical data which have been kept confidential by the company and which might cause substantial harm to the company if released;

Accidental data other than that within the first two exceptions were found to be disclosable because the data did not qualify as "commercial information" under the exemption provisions of section 552(b)(4) of the Freedom of Information Act (5 U.S.C. 552). Furthermore,

even if the accident data could be considered confidential "commercial information" within the exemption provisions of section 552(b) (4), the Commission decided that the data should be released in the interest of the public health and safety.

With regard to release of the submitted technical data, you are advised that engineering studies and other reports which discuss manufacturing techniques and which have been prepared at company expense would generally be considered exempt from disclosure within the scope of the third aforementioned exception.

A more complete discussion of the Commission's reasons for disclosing these data is contained in the enclosed memorandum which formed the basis for the Commission's decision. As stated in this memorandum the Commission will accompany release of the accident data with a statement that the information could be misleading because some television manufacturers maintained more complete accident records than other manufacturers.

As provided by section 1015.17(c) of the Commission's Interim Freedom of Information Guidelines (16 CFR, Part 1015), the accident and technical data will not be released for at least 10 days after your receipt of this letter.

Sincerely,

VINCE DELUISE
Director,
Freedom of Information Officer

cc: OS Reading File
OS FOI

VDeLuse:vlm:4/8/75

UNITED STATES GOVERNMENT

U.S. CONSUMER PRODUCT
SAFETY COMMISSION
WASHINGTON, D.C. 20207

MEMORANDUM

TO : The Commissioners DATE: March 21, 1975

FROM : Edward J. Cull

SUBJECT: Freedom of Information Act Requests for Disclosure of Information claimed to be confidential and submitted by television manufacturers in response to our special order of May 13, 1974 and our subpoena of July 26, 1974

Thru: Sadye Dunn, Secretary

Thru: Michael Brown, General Counsel

Thru: Richard Allen, Asst. General Counsel
for Administration

Background:

On May 13, 1974, a special order (Attachment A) was sent to 25 manufacturers of TV sets or components requiring them to submit data for the following categories of information: (1) all TV-related accident data collected since the 1969 hearings held by the National Commission on Product Safety; (2) current, future planned and suggested TV-related safety standards; (3) quality control and quality assurance plans; (4) data on future planned qualification requirements for TV service technicians; (5) improvement plans for presently used TV sets; (6) data on specific technical areas; and (7) data on standards adopted which exceed Underwriters' Laboratories' (UL) Standards. In response to the special order, approximately two cubic feet of information was submitted. The accident data consisted primarily of company forms describing the accidents in general terms without any backup information.

With the exception of a few manufacturers who were no longer producing TV sets, most of the manufacturers claimed that their accident data was confidential and in

some cases that their technical data (submitted in response to categories 2-7 above) were confidential.

On June 14, 1974, Health Research Group and Consumers Union made formal requests (Attachments B and C, respectively) under the Freedom Of Information Act, 5 U.S.C. 552, for the disclosure of all information submitted pursuant to the special order. All information not claimed to be confidential was subsequently disclosed.

The analysis of the submitted data by the Bureau of Engineering Sciences disclosed that additional data were not required from the manufacturers of TV components but that more information was needed from the manufacturers of TV sets. As a result, on July 26, 1974, a *subpoena duces tecum* was served on 16 television manufacturers. The subpoena (Attachment D) called for the submission of the following types of information:

(1) All TV-related accident reports since the 1969 hearings [corresponds to category one of the special order]; (2) records of standards adopted which exceed UL standards [corresponds to category seven of the special order]; (3) Texts and specifications for suggested TV-related safety standards for future use [corresponds to category two of the special order]; and (4) texts and specifications for suggested safety-related quality control and quality assurance plans for future use [corresponds to category three of the special order]. In addition, three manufacturers were required to submit information on (5) AC to DC chassis design development, (6) overheating design techniques, and (7) di-electric stress design techniques.

In response to the subpoena, approximately 48 cubic feet of material was submitted. This represents approximately 120,000 pieces of paper. It is estimated that approximately 50,000 pages are unmarked duplicates which when identified and sorted out would reduce the page total to 70,000. Of these 70,000 pages, roughly 80% or 55,000 pages consist of accident data. The remainder, 20% or 15,000 pages, consist primarily of technical information.

With the exception of Sanyo which submitted very little information, the remaining 15 TV manufacturers made claims of confidentiality for the data submitted in response to the subpoena. Thirteen manufacturers claimed confidentiality for all the information they submitted. Two manufacturers claimed confidentiality only for the accident data they submitted. The small amount of data not claimed to be confidential was made available to the requesters, Health Research Group and Consumers Union, whose earlier requests were deemed to extend to the subpoenaed materials.

On February 7, 1975, the Commission awarded a contract to Tracor-Jitco to process the accident data. By the terms of the contract, (Attachment E), Tracor-Jitco agreed, among other things, to extract certain information from the accident data. The extracted data would then be punched on computer cards and analyzed by us for accident patterns and for the use of the offeror chosen to develop a TV standard. The extracted accident data will consist of the following categories of information: (1) File number assigned to the accident, (2) manufacturer, (3) model numbers, (4) chassis number, (5) TV type (color or black and white), (6) chassis type, (7) switch type, (8) model type, (9) cabinet material, (10) year of manufacture, (11) owner's initials, (12) failed part, (13) location of failed part in set, (14) prior indication of trouble, (15) repaired prior to accident, (16) electric power status, (17) time in electric power status, (18) type of accident, (19) time of day, (20) state, (21) location, (22) number of injuries, (23) number of fatalities, (24) damage and (25) amount and type of claims. A copy of the extraction form is appended as Attachment F. The extraction of data is expected to be completed by the end of March.

Brief Description of the Material Subpoened:

The most important part of the material subpoenaed in terms of its importance to the manufacturers and requesters is the accident data. It is estimated that the data contain approximately 7,000 accident reports. The

type of information in the accident reports can be roughly broken down into the following categories of information:

1. Legal correspondence—correspondence, memos, etc., between a manufacturer and his attorney, whether within or outside the company relating to the settlement of claims or the handling of lawsuits.
2. Claim Settlements—data on how claim settlements were arrived at and how to proceed with claims that have not been settled.
3. Opinions—information from the manufacturers' own investigators and others, such as fire departments, on the causes of TV-related accidents.
4. Inter-Office Memoranda—memos and other correspondence among a manufacturers' personnel discussing various accidents.
5. Identity of the Victims and the Circumstances surrounding an accident—names and addresses of the people involved in TV-related accidents; model number of TV; information about how the accident occurred; who, if anyone, was injured or killed; the physical damage incurred, etc. There may also be taped conversations with an accident victim and photographs of the victim's dwellings depicting the damage caused by a TV-related accident.
6. Miscellaneous—a collection of data that is not relevant to TV hazards or safety.

The remainder of the information subpoenaed can be classified into two categories: (1) standards data which would include information with respect to standards that exceed UL standards, future TV-related safety standards and safety-related quality control and quality assurance plans; (2) design data which would include the information obtained from three manufacturers regarding AC to DC chassis design development, overheating design techniques and di-electric stress design techniques.

Some of the categories used to describe the accident data are also applicable to the standards and design data. Opinions and inter-office memoranda are also found in the standards and design data. These opinions or memoranda discuss among other things: manufacturing tech-

niques, processes and materials; funding for engineering studies; and improvements in the safety of a TV model. In addition, there are engineering studies and other reports which were prepared by company personnel or by outside organizations funded by the manufacturer. Some of these reports have been kept confidential; others have been made public. The remainder of the standards and design data consists of blueprints, plans, manuals, etc.

Discussion:

Because of the novelty and importance of the legal issues raised in the Freedom of Information (FOI) request for the TV data, it was deemed advisable to refer this matter directly to you rather than have the Secretary make an initial decision. The other principal reason for referring this matter to you is that our interim FOI guidelines (39 Fed. Reg. 30298) do not provide for an appeal to the Commissioners by the person claiming confidentiality for his data if his claim should be denied by the Secretary. Even if we allowed the TV manufacturers to appeal an adverse decision by the Secretary, the manufacturers would be under no legal obligation to do so and could immediately file suit in a Federal District Court. Given the possibility that a decision by the Secretary might be appealed directly to a court of law, it was deemed advisable to refer this matter to you so that you would have the opportunity to make a final decision on behalf of the Commission.

Almost all of the manufacturers who claimed confidentiality relied upon 5 U.S.C. 552(b)(4) which exempts trade secrets and confidential commercial or financial information. (A copy of the manufacturers' claims for confidentiality are available in the Secretary's office). In order for information to qualify under the 'trade secret' exemption, it must be either a trade secret or it must meet the following three criteria: (1) be commercial or financial information, (2) obtained from a person (rather than from another government agency), and (3) be privileged or confidential. (*National Parks and Conservation Association v. Morton*, 498 F.2d 765, 766 (1974)).

The accident data submitted by the TV manufacturers definitely meets the second criteria, i. e., obtained from a person. It also appears to meet the third criteria, i.e., confidential. In order to substantiate a claim of confidentiality, it is necessary to show that the release of the information is likely "... to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks and Conservation Association v. Morton supra*, at 770. The TV manufacturers asserted that the release of their accident data would drastically affect their sales and would tarnish their corporate images. It does not appear, however, that the data meet the first criterion of "commercial" information.

The House Report on the Freedom of Information Act (H. Rept. No. 1497), 89th Cong., 2d Sess.) lists various types of information which are considered confidential commercial or financial information. The House Report states:

The exemption [5 U.S.C. 552(b)(4)] would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency.

(H.Rept. No. 1497 at p. 10)

Almost identical language is found in the Senate Report on the Freedom of Information Act (S. Rept. No. 813, 89th Cong. 1st Sess. at p. 9).

Although the types of information listed in the House Report should not be considered exclusive, it does not appear that accident data is the type of information that Congress intended to include by the term "commercial information." The only cases which have discussed what types of information can be considered "commercial" are

Petkas v. Staats, 364 F. Supp. 680 (D.D.C.) 1973) rev'd on other grounds 501 F. 2d 889 (1974) and *Washington Research Project Inc. v. Department of H.E.W.*, 336 F. Supp. 929 (D.D.C. 1973). Neither case is of assistance with respect to accident data.

In the absence of any court cases and in view of the legislative history, it does not appear that accident data qualifies as commercial information and, thus, should be disclosed.

Assuming *arguendo* that accident data did constitute commercial information, (1970), the accident data could, nevertheless, be released because of the overriding public health and safety issue involved. Section 2(b)(2) of the Consumer Product Safety Act, Pub. Law 92-573, states that one of the purposes of this Act is: "to assist consumer in evaluating the comparative safety of consumer products." The release of the accident data would assist consumers to better evaluate the safety of TVs. However, as mentioned in the September 10, 1974 briefing package on the release of vinyl chloride information claimed to be confidential, no court has really decided whether to release or withhold confidential commercial information because the public health was involved.

It does not appear that all of the accident data should be released. Two categories of information in the accident data appear entitled to confidential treatment. The first category is the identity of the victim. Arguably, the identity of the victim should be withheld under 5 U.S.C. 552(b)(6) which protects from disclosure "... "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The accident reports might constitute "similar files" because if an injury is sustained by a victim, there will usually be a discussion of the injuries and the medical treatment rendered in the accident reports. Some of the accident victims might consider the release of this type of information to the public to be an invasion of their personal privacy. See, *Rural Housing Alliance v. United States Department of Agriculture*, 498 F. 2d 73 (D.C. Cir. 1974) for a more complete discussion of when 5 U.S.C. 552(b)(6) is applicable.

The second reason for withholding the identity of the victim is to achieve consistent treatment between accident reports submitted to the Commission and accident reports obtained from manufacturers. Under Section 25(c) of the Consumer Product Safety Act, the Commission is required to withhold the identity of an accident victim unless his/her consent is obtained. To establish a different standard for accident victims whose identity is obtained from a manufacturer might be considered inequitable treatment.

If the requesters would like to contact some accident victims, the Commission could seek to obtain the permission of the victims to release their names provided this does not prove to be too burdensome on our resources and time.

The second category of information in the accident data apparently entitled to confidential treatment is legal correspondence, memoranda, etc., which fall within the attorney-client privilege and/or the attorney's work product doctrine. The attorney-client privilege is mentioned in the legislative history of the Freedom of Information Act, quoted above, as falling within the trade secret exemption. The attorney work product doctrine is closely akin to the attorney-client privilege and provides a qualified immunity from disclosure of documents prepared by an attorney or his agent in anticipation of litigation. Wright and Miller, *Federal Practice and Procedure* § 2024 (1970). It should be noted that no Freedom of Information cases have arisen where the disclosing or withholding of the attorney's work product was decided. Since the attorney-client privilege is recognized as falling within the 'trade secret' exemption, logically the attorney's work product should also be covered. It is anticipated that there may be some difficulty in applying the attorney work product doctrine because of uncertainty whether the data was prepared in anticipation of litigation or by an agent of the attorney such as an investigator. However, the difficulty which may be encountered in applying an exemption should not work against its application.

The accident data that will be extracted by our contractor and placed on computer punch cards, (refer page

2 of this memorandum) does not contain the identity of the victim or any information subject to the attorney client privilege and/or the attorney work product doctrine.

With respect to the standards and design data, it appears that externally funded engineering studies which have not been made public fit the definition of confidential commercial information. Other types of confidential commercial information in the categories of standards and design data would be the company memos discussing techniques, processes or materials which are not known to other TV manufacturers and are not available from outside sources. The remainder of the standards and design data would be reviewed by a team of engineers to determine whether the release of the data would be likely to cause substantial harm to the competitive position of the manufacturer and whether the data has been kept confidential by the manufacturer.

The data obtained pursuant to the special order would be subject to the same disclosability/non-disclosability standards that the Commission establishes for the subpoenaed data.

Recommendations:

For the reasons discussed above, it is recommended that the Commission release all accident data submitted pursuant to our special order and subpoena with the following exceptions: (1) legal correspondence, memoranda, etc., which are exempt under the attorney-client privilege and/or the attorney work product doctrine; (2) the names and addresses of the accident victims as well as other identifying information.

It is recognized that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases, i.e., a higher accident rate for one particular TV model than similar models because more complete records were maintained. To ameliorate this problem, the Commission could release a simple statement at the time the accident data is

disclosed stating that the data could be misleading because some manufacturers maintained more complete accident records than other manufacturers.

It is also recommended that the data extracted by our contractor and placed on computer punch cards be made available to the requestors.

With respect to the standards and design data, it is recommended that the Commission not disclose the following: (1) engineering studies and other reports which have been prepared at company expense and not disclosed to the public; (2) memos and similar documents which discuss manufacturing techniques, processes, and the like that are unknown to other TV manufacturers and not available from outside sources; and (3) the remainder of the standards and design data which meet the tests of (a) causing substantial harm if released and (b) kept confidential by the manufacturers.

c:

C. Casper, SCAT (834)
W. Hobby, BEA (909)
R. Allen, OGC
E. Cull, OGC
S. Dunn, Secretary

[Illegible]

[Illegible]

[Illegible]

ROBERT PALMER
Covington & Burling
988 15th St., NW.
Washington, D.C. 20006

The Consumer Product Safety Commission today decided that no documents submitted by your company pursuant to subpoena or special orders or statistical analysis, compilations or other summaries based upon such documents will be released until May 2, 1975.

Signed: Sadye Dunn, Secretary
Consumer Product Safety Commission

15:20 EST

MGMWSHT HSA

[Title Omitted in Printing]

TEMPORARY RESTRAINING ORDER

Upon Plaintiff's Complaint and supporting exhibits and its Verified Application for Temporary Restraining Order together with its supporting affidavits, the Court concludes:

1. Defendants intend to disclose to members of the public certain data previously supplied by Plaintiff to the Defendant Commission and/or documents purporting to reflect summaries or compilations of this data.

2. Plaintiff contends: that these data were submitted to Defendants under express and implied understandings that such data would remain confidential and not subject to public disclosure; that such disclosure would violate 5 U.S.C. § 552(b)(4) and (7), 15 U.S.C. § 2055 and 18 U.S.C. § 1905; that such disclosure is not required by the Freedom of Information Act, 5 U.S.C. § 522; that such disclosure, by violating express and implied assurances of confidentiality, will constitute an unlawful abuse of agency discretion; that such disclosure will violate Defendants' own rules and regulations; and that it will suffer immediate and irreparable harm if public disclosure of the documents and information is made by Defendants.

3. It appears to this Court that there is a reasonable probability that Plaintiff will succeed on the merits of this case; that Defendants would not be subject to material prejudice by grant of this temporary restraining order pending disposition of Plaintiff's application for a preliminary injunction; and that, unless the Court grants this temporary restraining order, Plaintiff will suffer irreparable harm and injury if public disclosure of the aforesaid documents and information is made by Defendants.

4. Plaintiff has served upon counsel for Defendant all pleadings and papers herein and given notice of its intention to seek a temporary restraining order from this Court. Counsel for Defendants has consented to the entry of a temporary restraining order until such time as this

Court has heard and determined Plaintiff's application for a preliminary injunction.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED, this 25th day of April, 1975, that Defendants, their agents, officers and employees, are hereby enjoined from disclosing any of the following until the Court has heard and determined Plaintiff's application for a preliminary injunction or until further Order of the Court:

(1) Any data submitted by Plaintiff to the Defendant Commission in response to a special order issued May 13, 1974;

(2) Any data submitted by Plaintiff to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(3) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in paragraphs 2 and 3 above.

/s/ James L. Latchum
JAMES L. LATCHUM
United States District Judge

[Title Omitted in Printing]

ORDER

After consultation with counsel, and by agreement of the parties, it is hereby ordered this 29th day of May, 1975;

1. That the above-referenced cases are consolidated for purposes of discovery and a hearing on the plaintiffs' motions for preliminary injunctions.

2. That the defendants' answer or answers to the complaints herein shall be served not later than May 28, 1975.

3. That memoranda, briefs and affidavits in support of the motions for preliminary injunctions shall be served by plaintiffs not later than June 11, 1975.

4. That the defendants' responsive memoranda, briefs and affidavits shall be served not later than June 25, 1975.

5. Any further reply memoranda, briefs or affidavits by the plaintiffs shall be served not later than July 9, 1975.

6. Oral argument on the plaintiffs' motions for preliminary injunctions shall be held on July 23, 1975, at 11:00 A.M.

7. The transcripts of any depositions taken herein and the exhibits marked at such deposition shall be filed with the court under seal and kept under seal until further order of the court. Any confidential information contained in such transcripts and exhibits shall not be divulged except to counsel of record in these cases and other lawyers actively engaged in the litigation of these cases on behalf of the plaintiffs or the defendants.

(8) The deposition of defendant Richard O. Simpson, noticed by plaintiff Zenith Corporation, is adjourned *sine die*.

(9) At depositions of any defendant or any agents or employees of a defendant, any of the plaintiffs shall have the privilege of instructing the witness not to answer questions that call for the disclosure of confidential in-

formation pertaining to that plaintiff, subject to the further order of this court.

(10) All further memoranda, briefs and affidavits herein shall be filed initially under seal, but shall be automatically unsealed five days after service upon the parties is completed, unless one of the parties demonstrates good cause as to why the sealed material should not be unsealed.

All counsel of record have agreed to the entry of this Order.

/s/ James L. Latchum
JAMES L. LATCHUM
Judge

CONSENTED TO:

/s/ William H. Sudell, Jr.
WILLIAM H. SUDELL, JR.
1105 N. Market St.
Wilm., Del.
Attorney for GTE Sylvania
Incorporated and Aeronutronic
Ford Corporation

/s/ Andrew G. T. Moore
ANDREW G. T. MOORE
Market Tower
Wilm., Del.
Attorney for RCA Corporation

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4072 DuPont Building
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Attorney for Magnavox Company

/s/ Januar D. Bove, Jr.
JANUAR D. BOVE, JR.
Farmers Bank Building
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Attorney for Zenith Radio Corporation

/s/ Charles S. Crompton, Jr.
 CHARLES S. CROMPTON, JR.
 350 Delaware Trust Building
 Wilm., Del.
 Attorney for Motorola, Inc. and
 Teledyne Mid-America Corporation

/s/ Howard M. Berg
 HOWARD M. BERG
 500 Wilmington Tower
 Wilm., Del.
 Attorney for Warwick Electronics, Inc.

/s/ H. James Conaway, Jr.
 H. JAMES CONAWAY, JR.
 1401 Market Tower
 Wilm., Del.
 Attorney for General Electric
 Corporation

/s/ W. Laird Stabler, Jr.
 W. LAIRD STABLER, JR.
 U. S. Attorney
 Federal Bldg., Wilm., Del.
 Attorney for Defendants

[Title Omitted in Printing]

ANSWER

First Defense

Plaintiff's complaint fails to state a claim upon which relief can be granted.

Second Defense

The Consumer Product Safety Commission, Sadye Dunn, and Vince DeLuise are not proper parties to this action.

Third Defense

In specific response to each numbered paragraph of plaintiff's complaint, defendants state:

1. Defendants are without knowledge or information sufficient to form a belief as to the truth of this paragraph.
2. Admit.
3. Admit.
4. This paragraph contains a conclusion of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, it is denied.
5. Deny except to admit the authenticity of the letter dated April 8, 1975 and the attachment thereto, Exhibit G to plaintiff's complaint, and to refer the court to that exhibit for a full and complete statement of the contents thereof.
6. Deny except to admit the authenticity of Exhibit A to plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents of the letter dated May 13, 1974 and the Special Order.
7. Deny except to admit the authenticity of Exhibit B to plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents thereof.
8. Deny except to admit the authenticity of Exhibit C to plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents thereof.

9. Deny except to admit the authenticity of Exhibit D to plaintiff's complaint and to refer the court thereto, for a full and complete statement of the contents thereof.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph.

11. Deny except to admit the authenticity of Exhibit E of plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents thereof.

12. Deny except to admit the authenticity of Exhibit F of plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents thereof.

13. Deny.

14. Deny except to admit the authenticity of Exhibit G to plaintiff's complaint and to refer the court thereto for a full and complete statement of the contents thereof and to specifically refer the court to the Fourth paragraph of page 6 of the attachment, which indicates that at present no technical data, which is there referred to as standards and design data, is being released.

15. Admit.

16. Deny.

17. The first and third sentences of this paragraph are admitted. The second and fourth sentences of this paragraph are denied.

18. The first two sentences of this paragraph are denied except to refer the court to the April 8, 1975 letter for a full and complete statement of the contents thereof. The third and fourth sentences of this paragraph are denied except to refer the court to 39 F.R. 30298 (August 21, 1974) for a full and complete statement of the Interim Guidelines and their effect. The fifth sentence is admitted.

19. Deny except to refer the court to Exhibit G for a full and complete statement of the contents thereof.

20. Admit.

21. Deny except to refer the court to the staff memorandum referred to for a full and complete statement of the contents thereof.

22. Deny except to refer the court to the staff memorandum for a full and complete statement of contents thereof.

23. Deny except to admit the first sentence of this paragraph.

24. Deny except to refer to the Interim Guidelines at 39 F.R. 30298 (August 21, 1974) for a full and complete statement of the contents thereof.

25. Deny.

26. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

27. Deny.

28. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

29. Deny.

30. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

31. Deny.

32. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

33. Deny.

34. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

35. Deny.

36. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

37. Deny.

38. Defendants' answers to paragraphs 1-24 of the complaint are hereby adopted by reference as though they were fully set forth herein.

39. Deny.

40. Deny.

Defendants hereby specifically deny all the allegations of the complaint not hereinbefore otherwise answered.

Defendants deny that plaintiff is entitled to the relief sought by the complaint or to any relief whatsoever.

WHEREFORE, defendants pray that the action be dismissed with prejudice and that defendants be granted their costs.

Respectfully submitted,

REX E. LEE
Assistant Attorney General

W. LAIRD STABLER
United States Attorney

HARLAND F. LEATHERS

JEFFREY AXELRAD

BARRY M. KATZ
Attorneys, Department of
Justice
Attorneys for Defendants
Washington, D.C. 20530
Telephone: 202-739-3305

[Title Omitted in Printing]

ORDER

AND NOW, TO WIT, this 11th day of July, 1975, the United States Consumer Product Safety Commission ("the Commission") having moved for a modification of the Temporary Restraining Orders heretofore entered in these cases to permit a certain limited disclosure to Underwriters Laboratories, Inc. ("UL") of materials covered thereby, it is

ORDERED:

1. UL and those assisting UL in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on 16 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

2. For the sole purpose of developing safety standards for television receivers and not for public disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 16 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof, to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the

manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

3. Within ten days of the date hereof, the Commission shall furnish copies of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission, dated April 25, 1975 by Robert A. Yearance" ("the Yearance Report") to counsel for all plaintiffs. Counsel for each plaintiff shall have ten days from the date he is furnished a copy of the Yearance Report within which to object to its disclosure. If any objection is filed, the Yearance Report shall not be disclosed to anyone without further order of this Court. If no objection is filed, copies of the Yearance Report may be forwarded to UL and those assisting UL in the development of safety standards for television receivers.

4. Copies of this Order shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers, prior to the time they are given access to data and reports covered by this Order.

5. This Order shall not, in any way, be used by anyone to prejudice plaintiffs' legal position that the "accident reports" and data covered by this Order are inaccurate, misleading and immune from disclosure under applicable law.

/s/ JAMES L. LATCHUM
James L. Latchum
Chief Judge

PRELIMINARY INJUNCTION

On the basis of findings of fact and conclusions of law set forth in the Court's opinion of this date entered in these cases, it is

ORDERED

1. That pending final hearing and determination by the Court or until further order of the Court, the defendant, Consumer Product Safety Commission ("Commission"), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above.

2. Provided, however, the Commission is not enjoined hereby from making certain limited disclosures to Underwriters Laboratories, Inc. ("UL"), the entity retained by the Commission to develop safety standards for television receivers under 15 U.S.C. § 2056, upon the following terms and conditions:

(a) UL and those assisting in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on

16 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

(b) For the sole purpose of developing safety standards for television receivers and not for public disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 16 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

3. Provided further, however, that the Commission is not enjoined hereby from public disclosure of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission," dated April 25, 1975 by Robert A. Yereance (the "Yereance Report") so long as that Report or any accompanying information does not in any way, directly or indirectly, identify the manufacturers, model or chassis number of any television receivers alleged to have been involved in any "accidents" allegedly associated with any particular manufacturer, model or chassis.

4. Copies of this preliminary injunction shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers forthwith.

Dated: October 23, 1975.

/s/ James L. Latchum
JAMES L. LATCHUM,
Chief Judge

LATCHUM, Chief Judge

In these thirteen separate actions, each plaintiff, a manufacturer of television receivers, seeks a preliminary injunction restraining the Consumer Product Safety Commission ("Commission"), its members and officers from disseminating certain information to the public which the plaintiffs contend is privileged, confidential, misleading and inaccurate.

Congress, in 1972, enacted the Consumer Product Safety Act (the "Act"), 15 U.S.C. § 2051 et seq., in order to "establish comprehensive and effective regulation over the safety of unreasonably hazardous consumer products."¹ To implement and administer this legislative policy, the Act established the Commission as an independent regulatory agency. Shortly after its creation, the Commission became concerned about the safety of television sets. During the spring and summer of 1974, the Commission sought and obtained television-related accident data from television manufacturers in three ways: by a general public request for information, by a special order pursuant to 15 U.S.C. § 2076(b)(1), and finally by the issuance of subpoenas duces tecum pursuant to 15 U.S.C. § 2056(b)(3). Upon receipt of such information, the data was consolidated and a computer printout was prepared which listed the alleged accidents separately. On March 28, 1975, the Commission decided to release to the public the bulk of the television-related accident

¹ H.R. Rep. No. 1153, 92d Cong., 2d Sess. 26 (1972). The purposes of the Act are:

- "(1) to protect the public against unreasonable risks of injury associated with consumer products;
- (2) to assist consumers in evaluating the comparative safety of consumer products;
- (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
- (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries." 15 U.S.C. § 2051(b).

material in its possession which it had gathered from the plaintiffs.

Subsequently, each of the thirteen plaintiffs brought a suit against the Commission² for an injunction prohibiting the public dissemination of the information obtained from each on the ground that such information was privileged, confidential, misleading and inaccurate. The thirteen actions were consolidated³ for a hearing on plaintiffs' motions for preliminary injunctive relief. The defendants also consented to the entry of a temporary restraining order⁴ prohibiting the public disclosure pending the Court's decision on plaintiffs' present motions.⁵

I. BACKGROUND

In March 1974, the Commission issued a public notice⁶ announcing that it would hold a public hearing to investigate the hazards encountered during the operation of television receivers and to consider the necessity of developing safety standards for such receivers. By this

² In addition to the Commission, the following members, officers and employees were named as defendants: Richard O. Simpson, Chairman, Constance B. Newman, Vice Chairman, R. David Pittle, Lawrence M. Kushner, Barbara Hackman Franklin, Commissioners, Sadye E. Dunn, Secretary, and Vince DeLuise, Freedom of Information Officer. They will be referred to collectively as the "Commission" or "defendants."

³ Docket Item 10 (C.A. No. 75-104).

⁴ Docket Item 3 (C.A. No. 75-104). The temporary restraining order was later modified to permit release of the gathered information to four employees of Underwriters Laboratories, Inc., which had been retained by the Commission to develop safety standards for television receivers. In addition the data without identification of manufacturer, model or chassis number was authorized to be released to Underwriters Laboratories, Inc. and other individuals involved in developing the safety standards. Docket Item 34 (C.A. No. 75-104).

⁵ Defendants also moved for summary judgment in each case (Docket Item 35, C.A. No. 75-104), but these motions are not presently before the Court. (Docket Item 42, p. 3, C.A. No. 75-104).

⁶ 39 Fed. Reg. 10929 (March 22, 1974).

notice, the Commission sought certain technical information and TV-related accident data from manufacturers of television sets and the component parts thereof. The notice described the accident data sought in part as follows:

"Although the hearing is intended to emphasize fires and shocks related to TV sets, information pertaining to all aspects of TV set safety may be submitted (with the exception of radiation hazards . . .).

* * *

. . . In particular, each TV manufacturer is requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data records procedures differ from the method proposed in the 1969 'Electronic Industry Ad Hoc Engineering Report on Television Fires' which was submitted to the National Commission on Product Safety, place (sic) indicate the procedures used."⁷

Although a few manufacturers complied with the Commission's general request for data, their principal response consisted of a six page summary of accident data supplied by the Electronics Industry Association ("EIA").⁸

After reviewing the data voluntarily submitted, the Commission concluded that "the information submitted to the Commission by the EIA on behalf of the [Companies did] not satisfy the Commission's request."⁹ Thus on May 13, 1974, the Commission, acting pursuant to 15 U.S.C. § 2076(b)(1),¹⁰ sent special orders to twenty-

⁷ *Id.* 10930.

⁸ Par. 5 Affidavit of Constance B. Newman, Vice Chairman of the Commission ("Newman Aff'd") Docket Item 27, C.A. No. 75-112.

⁹ *E.g.*, Special Order of Commission to General Electric Company. Docket Item 11A, Ex. A-1, C.A. No. 75-136.

¹⁰ 15 U.S.C. § 2076(b)(1) provides: "The Commission shall have the power—(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as

five manufacturers of television receivers and components.¹¹ The information sought by these special orders was broken down into six categories: (1) TV-related accident data, (2) Current, future-planned and suggested TV-related safety standards, (3) Quality control and quality assurance plans, (4) Service technicians, (5) Improvement plans for presently used sets, and (6) Specific technical areas.¹²

The instructions for the TV-related accident data category provided:

"You are requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in 1969 'Electronics Industry Ad Hoc Engineering Report on Television Fires' which was submitted to the National Commission on Product Safety, please indicate the procedures used."¹³

In the cover letter¹⁴ accompanying the special orders, the Commission "[recognized] that some of the information to be submitted [might] be proprietary" and referred the manufacturer to certain statutory provisions¹⁵ designed to protect confidential information supplied to the government. The Commission encouraged compliance by stating in the cover letter:

the Commission may prescribe; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine."

¹¹ Of the plaintiffs here, only RCA did not receive a special order. *Newman Aff'd*, par. 6.

¹² *E.g.*, Special Order of Commission to General Electric Company. Docket Item 11A, Ex. A-1, C.A. No. 75-136.

¹³ *Id.*

¹⁴ *E.g.*, Letter of Richard O. Simpson, Chairman of the Commission, to General Electric Company, May 13, 1974. (Docket Item 11A, Ex. A-1, C.A. No. 75-136).

¹⁵ 15 U.S.C. § 2055(a)(1), 5 U.S.C. § 552(b)(4) & (7), 15 U.S.C. § 2055(a)(2), and 18 U.S.C. § 1905.

"This information will be received in confidence. It will not be placed in a public file and will not initially be made available to the public."

However, the possibility of a request for public access to this information by way of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, was noted, and the manufacturers were instructed to identify data claimed to be exempt from public disclosure and to "substantiate" any such claims. Claims of confidentiality accompanied the response of most manufacturers.¹⁶

Again, the Commission was not satisfied with the data supplied by the manufacturers pursuant to the special orders and the companies were notified as follows:

"The Commission has reviewed your response to its May 13, 1974, Special Order requesting information on TV-related fire and shock hazards. Although we recognize your effort to comply with the terms of the Special Order, technical analysis shows that your response fails to provide sufficient information with respect to certain questions enumerated in the Order.

Accordingly, the Commission has decided to issue the attached subpoena, pursuant to section 27(b)(3) of the Consumer Product Safety Act [15 U.S.C. § 2076(b)(3)] which specifies the additional information required.

It should be noted that failure to respond to the subpoena within the time specified therein may, pursuant to section 27(c) of the Act [15 U.S.C. § 2076(c)] lead to entry of a court order against you directing compliance with the Commission's subpoena."¹⁷

Thus, on July 26, 1974 subpoenas duces tecum were issued to the plaintiffs and three other TV manufac-

¹⁶ *E.g.*, Letter of H. C. Burgess, General Electric Co., to Richard O. Simpson, Chairman of the Commission, May 29, 1974. Docket Item 11A, Ex. A-2, C.A. No. 75-136.

¹⁷ *E.g.*, Letter of Sadie E. Dunn, Secretary of the Commission, to H. B. Walden, General Electric Co., July 26, 1974 (Docket Item 11A, Ex. A-3, C.A. No. 75-136).

turers¹⁸ requiring the production of certain technical information and all television-related accident data¹⁹ as follows:

"All TV-related accident reports collected since the 1969 hearings held by the National Commission on Product Safety. The term 'reports', includes, but is not limited to, all physical forms of: correspondence, letters; telegrams; cables; tapes; recordings; photographs; films; memoranda, including writeups of telephone calls and other oral communications; press releases, bulletins; newspaper, magazine or other journalistic articles; diaries; charts; contracts; agreements; and any other writing prepared by any person or persons, including those by insurance firms, investigators, laboratories and researchers; and includes both originals and copies whether or not sent or received. The term 'reports' includes those reports maintained on a form (sample attached) designed by members of the Electronics Industries Association (EIA) and submitted to the National Commission on Product Safety in November 1969

¹⁸ Sony Corp., Sanyo Electric, Inc., and Wells-Gardner Electronics Corp. were subpoenaed but did not seek to bar public disclosure of data which they forwarded to the Commission. Newman Aff'd, par. 8. Apparently, the Commission did not order all manufacturers of TV sets sold in this country to submit accident reports. Deposition of Robert L. Northedge ("Northedge Dep.") p. 78. Northedge, an electrical engineer, employed by the Bureau of Engineering Science of the Commission was project manager of the Commission's investigation of television hazards.

¹⁹ *E.g.*, Subpoena duces tecum addressed to H. B. Walden, General Electric Co., July 26, 1974 (Docket Item 11A, Ex. A-3, C.A. No. 75-136). Prior to serving the subpoenas the Commission had been warned of the confusion that might result from the problem of defining a TV-related accident. Letter of A. E. Allen, Philco-Ford Corp. to the Commission, May 28, 1974 appended to Joint Memorandum of GTE Sylvania and Aeronutronic Ford Corp. in support of motion for preliminary injunction. (Docket Item 24, C.A. No. 75-104). Evidently, there is no standard definition of TV-related accidents. Northedge Dep. pp. 29-32. Moreover, the brief preface of the subpoenas referred to the Commission's "investigation of shock and fire hazards associated with television receivers," but the body of the subpoenas designated "[a]ll TV-related accident reports."

and also those reports maintained on any and all forms substituted for the attached sample EIA form." ²⁰

Standards of reliability and accuracy for the data sought were indicated on sample data forms accompanying the subpoenas.

"The purported information in this form is based upon such reports as are available but in many cases will be incomplete, unverified and even incorrect." ²¹

The Commission sought unverified information intentionally because it wanted to obtain as large a data base as possible. ²² Again, accident reports supplied in compliance with the subpoena duce tecum were accompanied by claims of confidentiality. ²³ However, the Commission did not mention the issue of confidentiality in either the subpoena or the cover letter.

In order to reduce the information contained on the approximately 120,000 pieces of paper received in response to the subpoenas duces tecum to a manageable form, the Commission retained Tracor-Jitco, Inc. ("Tracor") to extract and categorize the data contained in the accident reports. ²⁴ This consolidation of information was designed to assist the organization engaged in developing safety standards and also to make the accident data more meaningful to members of the public who might inspect it under the Freedom of Information

²⁰ The description of TV-related accident data was identical for each subpoena. On the other hand, the technical information requested did vary slightly from manufacturer to manufacturer, but, generally, it corresponded to the materials sought in the May 13, 1974 special order. (Newman Aff'd, par. 9.)

²¹ Docket Item 35, C.A. No. 75-104.

²² Northedge Dep. pp. 169, 200, 258.

²³ Newman Aff'd, par. 10; *E.g.*, Letter of F. R. Wellner, General Electric Co., to Sadye E. Dunn, Secretary of the Commission, October 22, 1974 (Docket Item 11A, Ex. A-4, C.A. No. 74-136).

²⁴ Newman Aff'd, pars. 10, 15.

Act. ²⁵ Data summary sheets were prepared by gleaning from accident reports the appropriate responses for the several categories. ²⁶ Although many reports did not contain enough data to answer each question, ²⁷ the Commission was seeking as much information in manageable form as possible.

Tracor was responsible for transferring information from the accident reports to the data summary sheets from which the computer cards could be keypunched. In order to ensure that Tracor's employees performed the task accurately, Tracor's supervisor initially reviewed every sheet and later performed random checks by comparing the extracted data against the original report. Also, Robert A. Yereance, a consultant retained by the Commission, screened the same sheets that the Tracor supervisor examined. Finally, Robert L. Northedge, the Commission project manager, reviewed some of the abstracts. ²⁸

Then, the information on the data summary sheets was keypunched by another organization under contract with the Commission and was read into a Commission computer program which produced a printout of the in-

²⁵ Northedge Dep. pp. 24-25; Memorandum of Robert L. Northedge to Enid Rubenstein of the Commission, December 3, 1974 (Docket Item 11A, Ex. B, C.A. No. 75-136).

²⁶ A memorandum from Edward J. Cull, Office of General Counsel, to the Commissioners ("Cull Memorandum") 2, March 21, 1975 (Docket Item 11A, Ex. A-7, C.A. No. 75-136) lists twenty-five categories of extracted information: (1) file number assigned to the accident, (2) manufacturer, (3) model numbers, (4) chassis number, (5) TV type (color or black and white), (6) chassis type, (7) switch type, (8) model type, (9) cabinet material, (10) year of manufacture, (11) owner's initials, (12) failed part, (13) location of failed part in set, (14) prior indication of trouble, (15) repaired prior to accident, (16) electric power status, (17) time in electric power status, (18) type of accident, (19) time of day, (20) state, (21) location, (22) number of injuries, (23) number of fatalities, (24) damage and (25) amount and type of claims. The Newman affidavit indicates that there were twenty-seven categories of information. Newman Aff'd, par. 15(a).

²⁷ Northedge Dep. pp. 190-94.

²⁸ *Id.* pp. 216-20. It was not considered necessary to review every data sheet. *Id.* 219.

formation previously coded.²⁹ The printout was reviewed but only about fifty individual accident reports were checked against their summaries on the computer printout.³⁰

At this point, there were 10,765 separate line items;³¹ each line item represented a separate report. Tracor next undertook a duplication search. The duplication search was carried out by selecting a particular category of information and grouping the reports according to a common parameter within that category. For example, the accidents reported were grouped by the states in which they occurred; they were also grouped alphabetically by the initials of the victim; listing model numbers consecutively constituted another method. After grouping, summaries exhibiting the same classifying parameters were inspected for other similarities. When the comparison indicated that the reports might be related, the original accident reports were examined.³² As a result of this endeavor, separate reports of the same accident were consolidated and exact duplicates were eliminated. This winnowing procedure reduced the number of accident reports to 7,620.³³

Tracor also classified as confidential the identity of the victims and any documents encompassed by the work product doctrine and the attorney-client privilege.³⁴ This information, therefore, has been excluded from the filed accident reports and computer printout.³⁵

A Commission consultant, Robert A. Yereance, prepared a report captioned "Analysis of TV Accident

²⁹ At least 99 percent of the accident reports summarized on the computer printout were obtained through the subpoenas duces tecum. *Id.* p. 247.

³⁰ *Id.* p. 112.

³¹ *Id.* p. 221.

³² *Id.* pp. 223-225.

³³ Newman Aff'd, par. 17.

³⁴ *Id.* par. 15(c).

³⁵ *Id.* par. 17.

Data"³⁶ ("Yereance Report"), the purpose of which was stated to be as follows:

"To assist in the processing of the TV-related accident data and to analyze and summarize the data following completion of the data processing, the Commission hired a consultant, Robert A. Yereance. Mr. Yereance has prepared for the benefit of the offeror which has been selected to develop a TV standard, a report entitled, 'Analysis of TV Accident Data.' This report, which is based upon the accident data submitted to the Commission by the manufacturers, analyzes that data in terms of the number of television sets in use in the United States and the relative incidence of television-related accidents. The report does not identify a particular manufacturer, TV model, or chassis; it contains only industry-wide statistics. The purposes of this report were to answer basic questions concerning TV-related hazards, to provide a picture of the magnitude or relative significance of hazards that exist in TV sets currently in use, and to point out information which should prove valuable in the development of a standard to reduce hazards."³⁷

The requirement that manufacturers submit reports of dubious validity apparently reflected the Commission's concern that limiting the subpoenas to only verified reports would result in a data base which would be too small for proper analysis.³⁸ Also, it was thought that trends indicating design inadequacies of a particular

³⁶ Docket Item 41, C.A. No. 75-104. The temporary restraining order initially covered the Yereance Report. See note 4, *supra*. However, subsequent modification of that order (Docket Item 34, C.A. No. 75-104) provided that the Yereance Report, absent objection from plaintiffs, could be forwarded to Underwriters Laboratories, Inc. and those individuals assisting that organization in the development of safety standards.

³⁷ Newman Aff'd, par. 18.

³⁸ *Id.* par. 9; Northedge Dep. pp. 169, 200, 258.

manufacturer might appear.³⁹ However, the Commission never attempted to distinguish the verified reports from the unverified reports.⁴⁰ Indeed, of the more than 7,600 tabulated reports, the Commission investigated less than 100 of them.⁴¹

Furthermore, the confusion generated by the lack of a clear definition of "TV-related accident"⁴² is aptly reflected in the following dialogue between counsel for RCA and the Commission's project manager, Robert L. Northedge:

Q. [By Mr. Tiger] Mere speculation is enough to characterize it as a TV-related accident?

A. [By Mr. Northedge] For the purposes for which we subpoenaed this information, yes.

Q. Is it proper to characterize as a TV-related accident the situation where someone is watching television while smoking a cigarette and the lit cigarette falls in the cushioning of a chair and starts a fire?

(Whereupon, the reporter read the pending question.)

THE WITNESS: I wouldn't think that would be proper.

Q. [By Mr. Tiger] What if, during the fire, the TV caught on fire?

A. [By Mr. Northedge] It would be classified as a TV-related accident.

Q. Is it proper to characterize as a TV-related accident the situation where a fire results from defective wiring in the house and the point of origin of the fire happens to be in the area of the television set?

³⁹ Northedge Dep. pp. 242-43.

⁴⁰ *Id.* p. 262.

⁴¹ *Id.* p. 43.

⁴² See note 19 *supra*.

A. Yes, because it is possible that the TV could have—we don't know, but it is possible that the TV could have caused the short circuit in the wall outlet.

Q. What if the TV didn't cause the short circuit in the wall outlet, it was caused by something else?

A. Well, in many cases we don't know this so it is entered as a TV-related fire.

Q. Is it proper to characterize as a TV-related accident, the situation where a burning candle sitting on top of a television set melts the cabinet?

A. Yes."⁴³

Thus, it appears that an accident which would have been "TV-related" in one view could feasibly be perceived by another as not being "TV-related." That the Commission was well aware of the confusion and its consequences is clearly reflected in an internal memorandum which reads in part:

"It should be noted that some manufacturers appear to have submitted accident reports pertaining to fire and shock incidents only. Whereas, other manufacturers have submitted incident reports on TV tube implosions, carrying handle failures; (sic) instability of TV stands, etc., as well as incident reports on fire and shock."⁴⁴

Moreover, although some manufacturers did not comply fully with the subpoena, the Commission never made any effort to compel the appropriate response⁴⁵ because it had made "a technical judgment that sufficient information [had] been collectively submitted by the sixteen manufacturers to significantly facilitate the Commis-

⁴³ Northedge Dep. pp. 120-21. The following would also be classified as "TV-related accidents": cutting a finger on a screw protruding from a TV cabinet, *id.* p. 35; sustaining a hernia while carrying a TV set, *id.* pp. 35, 116; fire caused by a candle that had been placed on top of a TV cabinet, *id.* pp. 172-73.

⁴⁴ Bureau of Engineering Sciences of the Commission, "Report on Subpoena Compliance," Dec. 3, 1974 (Docket Item 11A, Ex. B, C.A. No. 75-136).

⁴⁵ Northedge Dep. pp. 259-61.

sion's regulatory development activities for TV receivers."⁴⁶

Finally, the Commission's disclosure accompanying the release to the public of the data submitted by manufacturers who are not parties to these actions focused on another critical source of inaccuracy:

"The television accident statistics being released to you may be misleading because some television manufacturers were more conscientious than (sic) others in maintaining television accident files."⁴⁷

Notwithstanding this melange of inaccuracies, the Commission reached a final decision on March 28, 1975⁴⁸ to release to the public the TV-related accident data and the computer printout compiled from the information ob-

⁴⁶ Memorandum of Robert L. Northedge to Enid Rubenstein of the Commission, December 3, 1974 (Docket Item 11A, Ex. B, C.A. No. 75-136).

⁴⁷ Newman Aff'd, par. 28. "It is recognized that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases, i.e., a higher accident rate for one particular TV model than similar models because more complete records were maintained." Cull Memorandum, p. 7.

⁴⁸ Newman Aff'd, par. 19. The Commission on August 21, 1974 apparently had promised the plaintiffs that the Secretary would first make an initial determination of the disclosure issues and that the Secretary's decision could be appealed to the Commission. *E.g.*, Letter of Sadye E. Dunn, Secretary of the Commission to H. B. Walden, General Electric Co., August 2, 1974 (Docket Item 11A, Ex. A-5, C.A. No. 75-136). Despite this promise, the decision on disclosure was made by the Commission initially and the possibility of an appeal was foreclosed. See Cull Memorandum, p. 4. Thus, no hearing was held on the claims asserted by the plaintiffs. Furthermore, the letter notifying the plaintiffs of the Commission's decision to release the accident data provided only for a minimum of ten days before disclosure. *E.g.*, Letter of Vince DeLuise, Freedom of Information Director of the Commission to Merle W. Kremer, GTE Sylvania Inc., April 8, 1975 (Docket Item 35, C.A. No. 75-104). Telegrams from the Commission eventually fixed May 1, 1975 as the proposed date of disclosure. (Docket Item 11A, Exs. A-8, A-9, C.A. No. 75-136).

tained from the plaintiffs.⁴⁹ In deciding to release this information to the public, the Commission relied⁵⁰ upon a memorandum⁵¹ prepared by its Office of General Counsel. The reasons for the disclosure are not clearly and explicitly set forth in this memorandum. However, it does state, "The release of the accident data would assist consumers to better evaluate the safety of TVs."⁵² No other affirmative reason in support of disclosure was offered.⁵³

In her affidavit of June 27, 1975 submitted during the course of this litigation, the Commission's Vice Chairman also asserted that "disclosure of the information would serve the important purpose of informing the public that hazards may exist in operating television receivers," and "would provide consumers with an indication of the kinds of questions that they should consider when purchasing a television set" and "that the large data base of TV-related accidents that [the Commission] had compiled would be useful to other parties interested in investi-

⁴⁹ These materials will be referred to as "information" or "accident data." The Commission evidently does not intend to release the technical information that it obtained from the plaintiffs. Newman Aff'd, par. 20; Docket Item 42, p. 53, C.A. No. 75-104. After the decision to disclose was reached by the Commission, the Yereance Report was prepared.

⁵⁰ Newman Aff'd, par. 19.

⁵¹ Cull Memorandum. A copy of this memorandum is included in what the Commission terms its administrative record in each case. *E.g.*, Docket Item 35, C.A. No. 75-104.

⁵² *Id.* p. 5. Also the Commission's letter informing the plaintiffs of its disclosure decision mentioned "public health and safety" as a reason for disclosure. *E.g.*, Letter of DeLuise, Freedom of Information Director of the Commission to Merle W. Kremer, GTE Sylvania, Inc., April 8, 1975 (Docket Item 35, C.A. No. 75-104).

⁵³ The bulk of the memorandum purports to establish that the Commission can release the data to the public under the Freedom of Information Act, 5 U.S.C. § 552. The impact of the Freedom of Information Act on the present actions will be discussed later in this opinion. See notes 73-76 and accompanying text, *infra*.

gating the potential hazards associated with television receivers." ⁵⁴

On the other hand, the numerous sources of inaccuracy compelled the Commission's consultant, Robert A. Yereance, to disagree with the Commission's decision to disclose the data. According to Northedge, "he didn't feel that much of it should be released at all." ⁵⁵ Furthermore, even Northedge concluded that the public could not meaningfully utilize the data as a valid basis for comparing the safety of the various manufacturers' televisions. ⁵⁶ In sum, it is apparent that the information obtained from the plaintiffs which the Commission proposes to release would be misleading to the consumer who attempted to use it for evaluating the relative safety of TV receivers manufactured by the plaintiffs.

⁵⁴ Newman Aff'd, par. 29. The propriety of considering these justifications raised initially in these proceedings is considered later. See notes 64 and 71 and accompanying text *infra*.

⁵⁵ Northedge Dep. p. 146.

⁵⁶ *Id.* pp. 179, 256. This point was conceded by the defendants at oral argument (Docket Item 42, p. 74, C.A. No. 75-104). Northedge's final comments at his oral deposition clearly shows that he, as project manager, could discern no benefit to the public of such disclosures. For example (Northedge Dep. pp. 276-277):

"Q. [By Mr. Palmer] Well, you have previously testified that the data is not meaningful as a basis for consumers to make comparative safety assessments among the different manufacturers. What purpose is served by the release of the identity of particular manufacturers other than to facilitate such a concededly invalid comparison?

A. [By Mr. Northedge] I don't know what purpose there would be.

Q. In other words, you can't think of any purpose that would be served by that?

A. Offhand, I cannot think of any purpose."

The Commission has offered plaintiffs the opportunity to come forward with information that would "substantiate" their claims of inaccuracy or duplication. Aff'd of Sheldon D. Butts, Assistant Secretary of the Commission, par. 2 (Docket Item 35, C.A. No. 75-104); Newman Aff'd, par. 27.

II. PLAINTIFFS' CONTENTIONS

The manufacturers have made numerous arguments in support of their contentions that disclosure of this information would be improper and that issuance of a preliminary injunction prohibiting disclosure would be appropriate. ⁵⁷

First, the plaintiffs assert that release of the information is prohibited by 15 U.S.C. § 2055(a)(2) which provides that information obtained by the Commission which "relates to a trade secret or other matter referred to in section 1905 of Title 18 shall be considered confidential and shall not be disclosed." The accident reports are viewed as being within a protected category.

Second, the Freedom of Information Act, 5 U.S.C. § 552, and 15 U.S.C. § 2055(a)(1) which refers to the FOIA are perceived as conferring upon the plaintiffs an affirmative right to block public release of the information.

Third, the Commission is charged with having violated 15 U.S.C. § 2055(b)(1) which in part requires the Commission to "take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]."

Fourth, the manufacturers challenge the procedure followed by the Commission in deciding to release the data. The Commission is said to have failed to promulgate rules to accommodate its information dissemination functions as required by FOIA, 5 U.S.C. § 552(a)(1), and to have failed to provide notice thirty days prior to public disclosure of the information and to supply a summary of the information destined for disclosure as mandated

⁵⁷ Although the manufacturers individually have raised different issues and stressed different arguments, their contentions are considered collectively. Also, while raising the same general issue individual plaintiffs may have emphasized uniquely perceived nuances. Therefore, even though the principal arguments are indicated, the list should not be viewed as an all inclusive catalogue.

by 15 U.S.C. § 2055(b)(1), and to have failed to comply with an earlier promise of an administrative appeal.

Fifth, the plaintiffs maintain that the Commission is estopped from disclosing the information because of the Commission's representation to the manufacturers that the material obtained would not be made public.

Finally, an accusation of having violated the Due Process Clause of the Fifth Amendment is brought against the Commission. This constitutional argument is founded upon both alleged procedural deficiencies and the arbitrary nature of the Commission's decision to make public the previously confidential information.

III. JURISDICTION AND SCOPE OF REVIEW

Although the plaintiffs have pleaded several jurisdictional grounds,⁵⁸ the Court finds that it has jurisdiction of this matter by virtue of 28 U.S.C. § 1337, which provides:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . ."

First, the general purpose of the Act to protect individuals who use consumer goods suggests a Congressional intention to regulate commerce.⁵⁹ Second, and more importantly, the regulation of commerce aspect of this legislation was explicitly set forth in 15 U.S.C. § 2051(a)(6).

"The Congress finds that—

* * *

regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter."

⁵⁸ Among the asserted bases for jurisdiction are 28 U.S.C. §§ 1331, 1332, 1346, 1361, 2201-02 and 5 U.S.C. §§ 702, 704. While some plaintiffs failed to mention the source of jurisdiction upon which the Court relies, it is nevertheless appropriate for the Court to recognize the applicability of § 1337 to those plaintiffs' claims. *Cf. Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377 (1904).

⁵⁹ See, e.g., S. Rep. No. 835, 92d Cong. 2d Sess. 7 (1972); H. R. Rep. No. 1153, 92d Cong. 2d Sess. 21-24, 26-27 (1972).

Thus, it is clear that the Act can be included under the umbrella of § 1337.⁶⁰ Furthermore, § 1337 constitutes an appropriate basis for the review of an administrative determination. *Davis v. Romney*, 490 F.2d 1360 (C.A. 3, 1974); *General Motors Corp. v. Volpe*, 457 F.2d 922 (C.A. 3, 1972), *aff'g* 321 F.Supp. 1112 (D. Del. 1970).

Closely akin to the issue of jurisdiction is the question of plaintiffs' standing to seek the requested relief.⁶¹ First, adverse publicity and harm to commercial reputation which would likely result from the proposed disclosure would amount to "injury in fact." Second, the requirements of 15 U.S.C. § 2055(b)(1) that the Commission take reasonable steps to assure accuracy and that disclosure be fair in the circumstances reflect a concern for the impact that inaccuracies and misleading public releases might have on manufacturers whose products were being investigated by the Commission. Thus, the interests which the plaintiffs seek to preserve are "arguably within the zone of interests to be protected" by 15 U.S.C. § 2055(b)(1). *Data Processing Service v. Camp*, 397 U.S. 150, 151-154 (1970); *Merriam v. Kunzig*, 476 F.2d 1233 (C.A. 3, 1973), *cert. den. sub nom. Gateway Center Corp. v. Merriam*, 414 U.S. 911.

Judicial review of administrative actions, of course, is governed by the Administrative Procedures Act, specifically 5 U.S.C. §§ 701-706.⁶² It is clear "that judicial

⁶⁰ It should also be noted that when the Act was codified in the United States Code, it was placed in Title 15, which deals with trade and commerce.

⁶¹ See also 5 U.S.C. § 702 (Administrative Procedure Act) which provides:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

⁶² 5 U.S.C. § 701(a) provides:

This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

[Footnote continued on page 110]

review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). No statute prohibits review of Commission action, and nothing has been found to suggest that Congress intended to confer upon the Commission unreviewable discretion as defined in 5 U.S.C. § 701(a)(2), a provision which has been given a very narrow interpretation. *E.g.*, *Adams v. Richardson*, 480 F.2d 1159 (C.A.D.C., 1973). Because the Commission plans no further proceedings before releasing the data, the finality requirement has also been satisfied.

Although plaintiffs are requesting a preliminary injunction, this action, nevertheless, amounts to a review of an administrative determination, and while the heavy burden imposed on a party seeking a preliminary injunction must be met fully, it is still necessary to define with some precision the scope of review open to this Court.

The appropriate scope of review of the Commission's decision to disclose the accident data is defined in 5 U.S.C. § 706(2)(A):

"The reviewing court shall—

* * * *

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Thus, the Court can prevent disclosure of accident data only if the Commission's actions fall beyond the per-

⁶¹ [Continued]

(2) agency action is committed to agency discretion by law.

5 U.S.C. § 704 provides in part:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

missible discretionary range defined by the "arbitrary and capricious" standard. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-15 (1971); *Camp v. Pitts*, 411 U.S. 138 (1973); *A. O. Smith v. FTC*, C.A. No. 75-15 (D. Del., filed September 22, 1975).⁶³ In *Overton Park*, *supra*, at 416, district courts were instructed that in applying the "arbitrary and capricious" standard, they "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Furthermore, "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). Therefore, although the Court must review the events below with great care, the plaintiffs, nevertheless, must make a clear and convincing showing that the Commission erred and exceeded the bounds of its discretion in deciding to release the accident data.

Also, it is necessary to determine what materials may be considered in reviewing the Commission's actions. "In applying [the 'arbitrary and capricious'] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, *supra* at 142. This language, the Commission contends,⁶⁴ precludes consideration of the Northedge Deposition and the affidavits submitted by both the plaintiffs and defendants. However, in both *Camp v. Pitts*, *supra* at 142-

⁶³ The only other conceivable standards are the "de novo" review provided for by 5 U.S.C. § 706(2)(F) and the "substantial evidence" test of 5 U.S.C. § 706(2)(E). Both *Overton Park*, *supra*, and *Camp v. Pitts*, *supra*, make it clear that these approaches are not applicable here. See *A. O. Smith*, *supra* at 5-9.

⁶⁴ Memorandum in Support of Defendants' Motions for Summary Judgment and Opposition to Plaintiff's (sic) Motion for Preliminary Injunction at 8-9, n.1 (Docket Item 35, C.A. No. 75-104).

143, and Overton Park,⁶⁵ *supra* at 420, the Supreme Court recognized that there are occasions when the reviewing court is justified in going beyond the limited administrative record. Although an inquiry of this nature should, as a general rule, be avoided, *United States v. Morgan*, 313 U.S. 409, 422 (1941); *South Terminal Corp. v. EPA*, 504 F.2d 646, 675 (C.A. 1, 1974); *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141 (C.A. 2, 1974), *cert. den.* 419 U.S. 874, it is essential in this case in order for the Court to have sufficient information to consider rationally the Commission's actions. See *Nuclear Data, Inc. v. AEC*, 364 F.Supp. 423, 425 (N.D.Ill. 1973).⁶⁶

Three sources of information not found in the record⁶⁷ have been offered to the Court; the deposition of the Commission's engineer and accident data program manager, Robert L. Northedge; the affidavit of Vice Chairman Newman; and affidavits of officers of the plaintiffs.⁶⁸

⁶⁵ The present proceeding, as did *Overton Park*, *supra*, involves agency action that cannot be classified as either adjudicatory or rule making. See *Texas v. EPA*, 499 F.2d 289, 296 (C.A. 5, 1974).

⁶⁶ In somewhat similar circumstances, a district court has been ordered to hold an evidentiary hearing before applying the "arbitrary and capricious" standard. For example, in *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (C.A.D.C., 1975), the plaintiffs sought to prohibit HUD from disclosing to Boston's Commissioner of Assessing certain financial information that had been submitted during the course of securing FHA-insured mortgages. The Court of Appeals instructed the reviewing court to conduct an evidentiary hearing but also ordered the review to be carried out under the "abuse of discretion" provision, also under 5 U.S.C. § 706(2)(A), which the Court for convenience referred to as the "arbitrary and capricious" standard. Cf. *Maryland-National Capital Park & Planning Comm. v. U.S. Postal Service*, 487 F.2d 1029 (C.A.D.C., 1973).

⁶⁷ The "record" here encompasses more than the materials contained in the Commission's purported official record. Internal Commission memoranda and even plaintiffs' communications to the Commission can be examined to determine if the Commission should have been aware of certain issues.

⁶⁸ The affidavits submitted by the plaintiffs are essential to establish irreparable harm required before a preliminary injunction can be issued. However, the Court has not considered plaintiffs' affidavits in evaluating the propriety of the Commission's actions.

Proper analysis of the uses of the Northedge Deposition and Newman Affidavit in these proceedings requires that descriptions of the data and the Commission's procedure for processing the data be separated from possible explanations of the Commission's decision to release the accident data. Before it can reasonably apply the appropriate legal standards, the Court must first be apprised of the nature of data collected, the value of the data and computer printout to someone studying TV-related accidents, and the means by which the Commission collected and processed the data. The Northedge Deposition and the first twenty-eight paragraphs of the Newman Affidavit provide that information. Neither probing the mental processes of the Commission's officials nor seeking knowledge outside the Commission's own limited sphere is involved.

On the other hand, paragraph 29 of the Newman Affidavit cannot be considered because it constitutes the most egregious type of "post-hoc rationalization" condemned in *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962), and *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The record suggests and the Newman Affidavit clearly states that the Commission relied upon the Cull Memorandum in reaching the decision to disclose the accident data.⁶⁹ This memorandum offers the only substantially contemporaneous explanation for the decision.⁷⁰

⁶⁹ Newman Aff'd, par. 19.

⁷⁰ It should be noted that the Cull Memorandum does not discuss all legal arguments offered to the Commission in opposition to disclosure. However, in an informal administrative proceeding, it is not mandatory that the substantially contemporaneous writing relied upon and adopted by the Commission specifically reject every contention. Cf. *Consumers Union of the United States v. Consumer Product Safety Commission*, 491 F.2d 810, 812 (C.A. 2, 1974).

The picture is further clouded by the Commission's failure to comply with its representation to the manufacturers that the Secretary would make the initial determination which in turn could be appealed to the full Commission. See note 48 *supra*. Deviations from ideal procedure have been viewed as a basis for relaxing the typically close confinement to the administrative record. *Sierra Club v. Hardin*, 325 F.Supp. 99 (D. Alaska 1971).

Denial of promised administrative appeal and the general inadequacy of the record as a factual basis for review have caused the

The other purposes set forth in the Newman Affidavit are "post-hoc rationalizations" which the Court is precluded from considering as a basis for administrative decision.⁷¹

IV. PRELIMINARY INJUNCTION

Before preliminary injunctive relief may be granted, plaintiffs must show (1) a reasonable probability of eventual success on the merits and (2) that they will suffer irreparable harm *pendente lite* if relief is not granted, and, furthermore, the Court must consider (3) the impact of its decision on other interested persons and (4) the public interest. *Oburn v. Shapp*, C.A. No. 75-1189 (C.A. 3, filed August 4, 1975) slip op. at 9-10; *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (C.A. 3, 1974); *A. O. Smith Corp. v. FTC*, 396 F.Supp. 1108, 1117-20 (D. Del. 1975) (appeal pending); *Bowers v. Columbia General Corp.*, 336 F.Supp. 609, 613 (D. Del. 1971).

A. Reasonable Probability of Eventual Success.

"It is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to

Court to consider remanding the proceedings to the Commission. See, e.g., *Secretary of Labor v. Parino*, 490 F.2d 885, 890-893 (C.A. 7, 1973); *Shannon v. HUD*, 436 F.2d 809 (C.A. 3, 1970). Both *Overton Park*, *supra*, and *Camp v. Pitts*, *supra*, conferred broad discretion without much guidance on the district courts to determine the appropriate procedures for clarifying the administrative record. *A. O. Smith*, *supra* at 27. Under the circumstances—a recently formed agency engaged in an informal proceeding—it does not seem necessary to remand the matter to the Commission. The Northedge Deposition and portions of the Newman Affidavit provide the Court with an adequate foundation for decision. Indeed, if these sources could not be used, it would be necessary to remand the case to the Commission with instructions to describe in detail the procedure followed in obtaining and processing the data.

⁷¹ The Court does consider these arguments when it evaluates the public interest in denying or granting preliminary injunctive relief. See IV C, *infra*.

make a *prima facie* case showing a reasonable probability it will prevail on the merits." *Oburn v. Shapp*, *supra*, slip op. at 10.

Congressional interest in securing manufacturers' cooperation⁷² and establishing a harmonious but effective relationship between the manufacturers and the Commission is reflected in 15 U.S.C. § 2055(b)(1), which provides in pertinent part:

"The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, [1] that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and [2] that such disclosure is fair in the circumstance and [3] reasonably related to effectuating the purpose of [the Act]."

Thus, before the Commission may release information to the public, a three step analysis must be satisfied. Failure to comply with any one of the standards means that disclosure would be improper.

At the outset, the Court is confronted by the Commission's oblique suggestion that § 2055(b)(1) may never apply where the information has been requested under the Freedom of Information Act, 5 U.S.C. § 552.⁷³ However, separate statutes regulating disclosure decisions of administrative agencies do have a significant and independent role. *FAA v. Robertson*, 43 U.S.L.W. 4833 (U.S. June 24, 1975). In *Robertson*, in spite of the language of the FOIA exception protecting matters "specifically exempted from disclosure by statute," 5 U.S.C. § 552 (b)(3) (emphasis added), a statute⁷⁴ granting an agency discretion to withhold or release safety information to the

⁷² See, e.g., 118 Cong. Rec. 31378-79 (1972) (remarks of Representative Moss).

⁷³ Memorandum in Support of Defendants' Motion for Summary Judgment and Opposition to Plaintiff's (sic) Motions for Preliminary Injunction, 14, n.4 (Docket Item 35, C.A. No. 75-104). FOIA requests for the accident data have been received by the Commission. *Newman Aff'd*, pars. 11-14, 20.

⁷⁴ 49 U.S.C. § 1504.

public was found to have continuing viability.⁷⁵ The Supreme Court acknowledged that "Congress could appropriately conclude that the public interest was better served by guaranteeing confidentiality in order to secure the maximum amount of information relevant to safety." Robertson, *supra*, 43 U.S.L.W. at 4837.

To argue that § 2055(b)(1) becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming⁷⁶ but, nevertheless, imposed affirmative obligations on the Commission which cannot flippantly be avoided.

First, the Commission is charged with the duty of taking "reasonable steps to assure," before disclosure, the accuracy of information from which the identity of the manufacturer can be readily ascertained.⁷⁷ It must be emphasized that the Commission is not a guarantor of the accuracy of the information which it releases;⁷⁸ to require the Commission to prove that its materials are

⁷⁵ Indeed, the problem of "repeal by implication" facing the Supreme Court in Robertson, 43 U.S.L.W. at 4837, is not present here because the FOIA (1966) was enacted before the Act (1972). The 1974 FOIA amendments, P.L. No. 93-502, did not alter the FOIA's impact in these circumstances.

⁷⁶ *E.g.*, Hearings on H.R. 8110, H.R. 8157, H.R. 260 (and identical bills) and H.R. 3813 (and identical bills). Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st & 2d Sess. 897-98 (1972) (statement of Mr. Nader).

⁷⁷ Because the manufacturers are expressly identified, it is not necessary to delineate the contours of the "readily ascertainable" standard of § 2055(b)(1). Each accident report is in a separate file that contains, *inter alia*, the manufacturer's name. Newman Aff'd, par. 17. The computer printout also identifies the manufacturer whose product allegedly generated that line item. Cull Memorandum, p. 2.

⁷⁸ However, H.R. Rep. No. 1153, 92d Cong., 2d Sess. 32 (1972) states that "the Commission has a responsibility to assure that the information which it disseminates is truthful and accurate."

accurate would raise an insurmountable barrier to disclosure. Instead, an affirmative obligation to "take reasonable steps to assure" that information which it releases is accurate has been imposed on the Commission.⁷⁹ To determine whether the Commission complied with the requirement, the Court must consider both the means selected to gather the data and the procedure employed to process the data.

The Commission strenuously argues that its method fulfilled the statutory mandate of taking reasonable steps for assuring accuracy, but it is difficult to accept this contention on review of the Commission's data-gathering activities.⁸⁰ The company that submitted only accurate reports would not have complied with the requirements of the subpoena because production of all reports—verified or unverified—was ordered by the Commission. One is at a loss to understand how demanding submission of

⁷⁹ The Report of the House Committee on Interstate and Foreign Commerce suggests the underlying rationale for restricting the Commission's discretion to disclose data that it has collected.

"If the Commission is to act responsibly and with adequate basis, it must have complete and full access to information relevant to its statutory responsibilities. Accordingly, the committee has built into this bill broad information-gathering powers. It recognizes what in so doing it has recommended giving the Commission the means of gaining access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to trade secrets or other sensitive cost and competitive information. Accordingly, the committee has written into section 6 [15 U.S.C. § 2055] of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this act." H.R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

⁸⁰ The Court does *not* suggest in any way that issuing subpoenas duces tecum for all accident data—accurate or inaccurate—was improper. The Commission is the best judge of what is needed for its own internal purposes. In fact, the limitations on disclosure of 15 U.S.C. § 2055 which protect manufacturers enhance the argument for conferring broad subpoena powers on the Commission. If manufacturers do not have to fear the adverse effects of inaccurate Commission releases, they will be less likely to resist efforts to obtain accident data essential for the Commission's safety standard efforts.

inaccurate data constitutes a reasonable step in assuring the accuracy of information which it will eventually disclose.

The Commission, however, argues that since the reports were submitted by the manufacturers, it cannot be held responsible for the accuracy of the reports. This attempt to shift responsibility for assuring accuracy fails because the duty to take reasonable steps for assuring accuracy was placed on the Commission—not the manufacturers. There is no indication that Congress sought to require manufacturers to investigate each accident report received.⁸¹

Furthermore, the word "information" as used in § 2055(b)(1) embodies a concept of more than just empirical data. It is especially important to be aware of the impression that will be created by release of the data when the primary purpose for disclosure is to enable comparative safety shopping. Ambiguities in the definition of "TV-related accident" caused some manufacturers to submit only reports of fires and electrical shocks while other manufacturers submitted all accident reports. The Commission was made aware of this potential confusion before it issued its subpoenas but, apparently, refused to take any steps to ameliorate the situation. Furthermore, the Commission never sought to remedy the incomplete responses of some manufacturers to the subpoenas⁸² even though the Commission had ample powers to compel com-

⁸¹ Because a manufacturer does not have a duty to investigate accident reports, the Commission's gratuitous offer to allow the manufacturers to challenge the validity of individual accident reports (Aff'd of Sheldon D. Butts, Ass't Secretary of the Commission, par. 2, Docket Item 35, C.A. No. 75-104) does not satisfy the Commission's statutorily imposed duties. The Commission also asserts that it has faithfully satisfied its statutory obligation by merely passing on without error the data submitted by the manufacturers. This argument also ignores the fact that it is the Commission which has the responsibility of striving to make its releases accurate.

⁸² Evidently, varying degrees of compliance did not bother the Commission because it believed that it had obtained sufficient data to enable it to begin the process of defining safety standards. (Northedge Dep. p. 260).

pliance. 15 U.S.C. § 2076(c). Clearly defining the data that it sought and seeking full compliance with its subpoenas were but two reasonable steps which the Commission could have taken to assure that the information was accurate.⁸³

On the other hand, the procedures followed by the Commission in processing the raw reports were reasonable for assuring accuracy of the information gathered. The careful initial supervision and later random checks were adequate to assure proper transfer of the data obtained to the summary sheets.⁸⁴ It appears that standard practices were followed in keypunching and obtaining the computer printout. Finally, while the manufacturers contend that not all duplicates were eliminated,⁸⁵ the duplication search also would seem to have been reasonable in the circumstances.

Second, before release of the TV-related accident data can be permitted, disclosure must be "fair in the circumstances." Fairness obviously is a concept that eludes precise definition. Because of the Commission's decision to subpoena unverified reports, the ambiguity of the subpoena, the failure of the Commission to seek compliance

⁸³ On the other hand, the uneven quality of record-keeping among the manufacturers was beyond the control of the Commission. While the company which had the best recordkeeping operation would, in effect, be punished for its efforts, no reasonable steps were open to the Commission to correct the source of misleading impressions.

⁸⁴ The data processing phase is described in the text accompanying notes 24-35, *supra*.

⁸⁵ *E.g.*, Affidavit of John F. Eisenmann, Manager, Consumer Technical Affairs, Aeronutronic Ford Corp., pars. 7, 10. (Docket Item 22, C.A. No. 75-116). Perhaps it is inappropriate to consider these affidavits because, as indicated at notes 64-71 and accompanying text *supra*, they are not part of the administrative record. It is, however, unclear when the printouts were first made available to the companies. If the printouts were not released until after the Commission had made its decision, the companies would not have had any opportunity to comment in a timely fashion to the Commission on the official record. In light of the Court's conclusion on the substantive issue raised by the affidavit, it is not necessary to decide whether the allegation is properly before the Court.

by all manufacturers and the differing quality of record-keeping, it is conceded that a comparison of the accident data to determine the relative safety of the various manufacturers' products would be improvident and misleading. However, the only caveat which the Commission proposes to release with the public disclosure relates to one source of error only—the differing qualities of record-keeping. Apparently, nothing will reflect the other sources of possible error.

Basically, the Commission proposes to release information that could unjustifiably damage⁸⁶ the manufacturers because the data does not form a reliable foundation for safety comparison—the only contemporaneous reason given by the Commission for the release of the information. Moreover, the public would be misled by the Commission's efforts. Although fairness is difficult to define, it is even more difficult to determine how disclosure of this information would be "fair in the circumstances."⁸⁷

Third, it must be determined whether disclosure is "reasonably related to effectuating the purposes of [the Act]." Only one reason for disclosure was set forth in the contemporaneous Cull Memorandum upon which the Commission relied in deciding to release the information: "The release of the accident data would assist consumers to better evaluate the safety of TVs."⁸⁸ One of the pur-

⁸⁶ The potential harm to plaintiffs is discussed at IV (B) *infra*.

⁸⁷ The Commission in attempting to reduce this data to an intelligible format has unintentionally aggravated the problem. A clear computer data listing, with its immediate impact, creates an impression of accuracy that far outshines several filing cabinets of jumbled accident reports.

Furthermore, despite the Commission's contentions to the contrary (Memorandum In Support of Defendant's Motion for Summary Judgment and Opposition To Plaintiff's (sic) Motions for Preliminary Injunction, p. 15, Docket Item 35, C.A. No. 75-104), the release of this information by a government agency carries with it an aura of authenticity which cannot be ignored in determining whether the disclosure is "fair."

⁸⁸ Cull Memorandum, p. 5.

The administrative record indicates that this was the only contemporaneous explanation for the Commission's decision to disclose.

poses of the Act is "to assist consumers in evaluating the comparative safety of consumer products." 15 U.S.C. § 2051(b)(2). Therefore, if it were possible to use this information to contrast the safety records of the various manufacturers, disclosure would be reasonably related to achieving the goals of the Act. However, it is clear that the materials which the Commission proposes to disclose cannot aid consumers in determining which television manufacturer has the safest product, and therefore would not be "reasonably related to effectuating the purpose of [the Act]."

Accordingly, plaintiffs have convinced the Court that they have a reasonable probability of success in showing that the Commission failed to "take reasonable steps to assure" that the accident information would be accurate, that disclosure would not be "fair in the circumstances" and would not be "reasonably related to effectuate the purpose" of the Act.⁸⁹

B. Irreparable Harm.

The plaintiffs aver, by way of verified complaint and affidavit,⁹⁰ that release of the data to the public would irreparably injure their goodwill and reputations by

See notes 52-53 and accompanying text *supra*. The "post-hoc rationalizations" of the Newman Affidavit, while not appropriate for consideration here, are addressed when the preliminary injunction issue of harm to the public is reached." See IV (B) *infra*.

The memorandum also urges disclosure in response to the "overriding health and safety issues involved." The Commission obtained the accident reports by early fall of 1974 but did not decide to release them until the spring of 1975. Thus, the Commission, by its own actions, has indicated that time is not of the essence. A generalized warning of the hazards encountered while watching television would not have required identification of the manufacturers. See note 93 *infra*.

⁸⁹ In light of the Court's resolution of the issues raised under 15 U.S.C. § 2055(b)(1), it is not necessary to consider the other contentions urged by the plaintiffs for preliminary injunctive relief.

⁹⁰ *E.g.*, Affidavit of Fred R. Wellner, General Manager, Television Receiver Products Dept., General Electric Co., pars. 4-14 (Docket Item 11A, Ex. A-Aff., C.A. No. 75-136).

generating unwarranted adverse publicity. Furthermore, they contend that their competitive positions would be unfavorably affected by public disclosure of sensitive, confidential trade and commercial information.

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11 Wright & Miller, Federal Practice and Procedure § 2948, p. 431 (1973). The plaintiffs' reputations would suffer substantially from the Commission's release of misleading safety information.⁹¹ This risk is not merely speculative, and furthermore the irreparable nature of injury to commercial reputations has been widely recognized. *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F.Supp. 1183, 1189-90 (E.D.N.Y. 1972); *Cutler-Hammer, Inc. v. Universal Relay Corp.*, 285 F.Supp. 636, 639 (S.D.N.Y. 1968).

The information which the Commission proposes to release would not normally have been made public by the plaintiffs, and it appears that the data would appropriately be deemed confidential.⁹² The planned disclosures would undoubtedly harm the plaintiffs by giving their competitors access to sensitive information.

Furthermore, once the information is disseminated, the Court becomes powerless to protect or to restore the status quo pending a final determination of the merits. A preliminary injunction is especially appropriate where the action sought to be enjoined would "impair the court's ability to grant an effective remedy." 11 Wright & Miller, Federal Practice and Procedure § 2948, p. 434 (1973).

⁹¹ "When the Government focuses adverse publicity on named parties, the consequences to such parties can be disastrous." Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 Harv. L. Rev. 1380, 1381 (1973).

⁹² Plaintiffs also argued that the data constituted either trade secrets or other protected confidential information. The Court did not reach these issues and uses the word "confidential" here in a more colloquial sense.

Thus, the Court finds that disclosure as proposed by the Commission would irreparably harm the plaintiffs. See *Sims v. Greene*, 161 F.2d 87 (C.A. 3, 1947).

C. *Impact On Other Interested Persons And The Public Interest.*

The Court must also consider the consequences of its decision on both interested persons and the public in general. *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, *supra*. First, the Commission would not be significantly affected by issuance of a preliminary injunction preventing release of the accident data. The primary objective—obtaining enough data to be able to promulgate safety standards—has been achieved.

Second, in order for a preliminary injunction prohibiting disclosure to harm the public, disclosure first would have had to have been beneficial to the public. The Commission has urged that publicizing the information would assist the public in comparing the safety of various television models. However, it is clear that the data, subject to many potential sources of inaccuracy, simply cannot provide a rational basis for comparative safety shopping.

The Commission also asserts that disclosure would warn the public of hazards associated with the operation of televisions and would suggest questions to ask when purchasing a television, but these two goals could be achieved without releasing the identity of the manufacturers.

Finally, the Commission suggests that the data might be useful to other parties interested in investigating the safety of television receivers. First, the rather speculative benefit is not very significant when compared to the immediate and direct injury that would fall on the plaintiffs if the data were released to the public. Second, it is appropriate to recognize in deciding whether to grant temporary relief that the public interest in the safety investigation is being protected by an energetic and capable Commission investigation.

In sum, it is difficult to perceive how the public interest would be harmed by enjoining the disclosure of information of dubious accuracy.⁹³

Accordingly, the Court finds that it is appropriate to preliminarily enjoin the disclosure to the public of the accident data and the computer printout.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52, F.R.Civ.P.

An order will be entered in accordance with this opinion.

Wilmington, Delaware
October 23, 1975.

⁹³ In their memoranda and at oral argument, the parties devoted little attention to the Yereance Report. See notes 36-37 and accompanying text, *supra*. Nevertheless, it appears that plaintiffs still seek to bar its release to the public. (Docket Item 42, p. 3, C.A. No. 75-104).

The Yereance Report mentions the manufacturers twice. First, in parallel vertical columns the manufacturers and their respective Commission filing numbers are listed. (A-7) No accident information is revealed, and, furthermore, the filing numbers are not used elsewhere in the report. Second, the report describes the layout of the computer printout and indicates that the printout identifies the manufacturers. (B-4) The names of manufacturers who could be listed are set forth, and, of course, the plaintiffs are included. Again, no accident information is discussed in conjunction with mention of the manufacturers. Thus, while the Yereance Report is a sobering study of the physical dangers that one may encounter while watching television, the manufacturers are in no way singled out for special attention. There is nothing in the Yereance Report that relates or links accident data to a particular manufacturer.

Therefore, it appears that public dissemination of the Yereance Report would not harm the manufacturers. The absence of irreparable harm is an appropriate basis for declining to grant preliminary injunctive relief. *Commonwealth of Pennsylvania ex rel. Creamer v. United States Department of Agriculture*, 469 F.2d 1387, 1388 (C.A. 3, 1972).

Furthermore, public interest considerations militate against enjoining disclosure. The Yereance Report represents a straightforward, easy to read document that can inform the public of television hazards. Balancing the benefits of the disclosure against the minimal adverse consequences that might affect the television manufacturing industry as a whole indicates that enjoining disclosure of the Yereance Report would be improper.

Thus, the Court will not issue a preliminary injunction prohibiting disclosure of the Yereance Report.

[Title Omitted in Printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, by their undersigned attorneys, hereby move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that no genuine issue exists as to any material fact and defendants are entitled to judgment as a matter of law. In support of this motion, the Court is respectfully referred to the Affidavit of Constance B. Newman, former Vice-Chairman of the Consumer Product Safety Commission, dated June 27, 1975, previously filed with the Court (a copy of which is attached hereto as Exhibit A); Affidavit of Sheldon Butts, Assistant Secretary of the Consumer Product Safety Commission dated July 2, 1975, previously filed with the Court (a copy of which is attached hereto as Exhibit B); a certified copy of the Consumer Product Safety Commission's October 6, 1975 Executive Session Minute, attached hereto as Exhibit C; the deposition of Robert Northedge, dated May 29, 1975; the administrative records, all previously filed with the

Court; and to Defendants' memorandum in support of their motion for summary judgment.

Respectfully submitted,

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

/s/ James W. Garvin, Jr.
JAMES W. GARVIN, JR.
United States Attorney

/s/ Lynne K. Zusman
LYNNE K. ZUSMAN

/s/ Sandra Wien
SANDRA WIEN

Attorneys, Department of
Justice
Civil Division, Room 6343
Washington, D.C. 20530
Tel.: 202-739-2240

Attorneys for Defendants

OF COUNSEL:

THEODORE GARRISH
General Counsel

ED CULL
JEANETTE WILTSE

Attorneys, Consumer
Product Safety
Commission

[Title Omitted in Printing]

AFFIDAVIT OF CONSTANCE B. NEWMAN

Constance B. Newman, being duly sworn, deposes and says:

1. I am the Vice-Chairman of the Consumer Product Safety Commission, an independent federal regulatory Commission, which has been in existence since May 14, 1973.

2. The principal statute administered by the Commission is the Consumer Product Safety Act of 1972 (CPSA), 15 U.S.C. section 2051 *et seq.* This statute was enacted by Congress to protect the public against unreasonable risks of injury associated with consumer products.

3. Shortly after its establishment, the Commission began investigating the hazards associated with television receivers. The Commission had become aware of the occurrence of numerous TV-related accidents from (a) the work of the Commission's predecessor, the National Commission on Product Safety, more fully discussed, *infra*; (b) product defect reports filed with the Commission by television manufacturers; (c) a field survey conducted by the Commission to sample the number of TV-related fires; (d) data obtained from hospital emergency rooms through the National Electronic Injury Surveillance System (NEISS); and (e) TV-related accident reports compiled by the Commission through various means such as consumer injury reports and news articles.

4. On March 22, 1974, the Commission published in 39 Fed.Reg. 10929 (March 22, 1974) a notice of a public hearing on the hazards associated with television receivers and of the need to proceed with the development of a safety standard for televisions. In this notice, manufacturers of TV sets and components were requested to submit TV-related accident data and five categories of technical information. The request for TV-related accident data was as follows:

"In particular each TV manufacturer is requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in the 1969 'Electronics Industry Association Ad Hoc Engineering Report on Television Fires,' which was submitted to the National Commission on Product Safety, place [sic] indicate the procedures used."

5. Only a few manufacturers submitted the data requested. Instead, the Electronics Industry Association (EIA), on behalf of the television manufacturers, submitted a six-page summary of accident data, which contained statistics allegedly showing the number of fire and shock accidents per one million television sets manufactured for the years 1970 through 1973. The EIA failed to supply the Commission with any details about the accidents.

6. Because the Commission considered the response by the TV manufacturers to the request for information in the *Federal Register* Notice to be inadequate, the Commission on May 13, 1974, issued a special order pursuant to section 27(b)(1) of the Act, 15 U.S.C. section 2076(b)(1), to 25 manufacturers of television receivers or components, including all of the plaintiffs, except for R.C.A. This special order asked for virtually the identical information that was requested in the above-described *Federal Register* Notice, i.e., TV-related accident data and five categories of technical information.

7. In response to this special order, accident data and technical information was submitted which was claimed to be confidential by most of the manufacturers making said submissions. The Commission's review of these submissions disclosed that the responses by the companies were not complete in a number of areas.

8. Thus, on July 26, 1974, a subpoena *duces tecum* was issued by the Commission, pursuant to section 27(b)(3) of the Act, 15 U.S.C. section 2076(b)(3), to the plaintiffs and three other TV manufacturers, Sony Corp., Wells-Gardner Electronic Corp., and Sanyo Electric, Inc. This subpoena required the submission of TV-related

accident reports collected by the manufacturers since the 1969 hearings held by the National Commission on Product Safety. It also required the submission of various types of technical information previously requested. The subpoena was sent to only 16 companies because most of the companies not subpoenaed had terminated their manufacture of TV sets or TV components.

9. Although the 16 subpoenas issued were not identical in terms of the technical information requested, each company did receive identical requests for TV-related accident reports. The term 'report' was broadly defined so that the Commission would receive the largest possible data base for TV-related accidents.

10. In response to the subpoenas, approximately 120,000 pieces of paper were submitted by the manufacturers, of which it is estimated that 80% consisted of accident data. Fifteen of the 16 subpoenaed manufacturers, including all of the plaintiffs, made claims of confidentiality for all the accident data submitted and for most of the technical information submitted. The small amount of information not claimed to be confidential was made public.

11. By letters dated June 14, 1974, (attached hereto as Exhibits 1 and 2), Consumers Union and Health Research Group made formal requests under the Freedom of Information Act for the disclosure of all information submitted by the manufacturers pursuant to the special orders. After viewing those portions of the material as to which no claims of confidentiality were made, Health Research Group by letter dated July 11, 1974, (attached hereto as Exhibit 3), reasserted its request. By letters dated July 23, 1974, (attached hereto as Exhibits 4 and 5), the Secretary of the Commission informed the requesters that the Commission would respond to their requests as expeditiously as technical analysis and evaluation of the materials on withholding or disclosure would permit.

12. After the issuance of the subpoenas on July 26, 1974, the above-described Information Act requests were informally considered by the Commission to extend to the subpoenaed material. By letters dated August 2, 1974,

the Secretary of the Commission informed the manufacturers of the pending Information Act requests and asked for information to substantiate the manufacturers' claims of confidentiality. The responses of the manufacturers are included in the administrative records submitted in these cases.

13. On October 16, 1974, and October 21, 1974, Consumers Union and Health Research Group wrote letters to the Commission (attached hereto Exhibits 6 and 7), criticizing the failure of the Commission to comply with the Information Act requests and stating that a failure to comply by November 1, 1974, would be considered a denial.

14. In response to these letters, a public meeting was held on November 5, 1974, which was attended by Commission personnel, representatives of Health Research Group and Consumers Union, and a representative from the Electronics Industries Association. The meeting consisted of a discussion of the magnitude of the data collected and the possibility of cataloging the information and placing the accident data on computer punch cards. The minutes of this meeting are attached hereto as Exhibit 8.

15. On February 7, 1975, the Commission awarded a contract (Exhibit P-5 to the deposition of Robert Northedge) to Tracor-Jitco, Inc. to process the accident data and catalogue the technical information. The contractor was required to perform the following four tasks under the terms of the contract:

(a) the abstraction of information from each accident report and the entering of said information on a form (attached hereto as Exhibit 9), entitled TV Accident Data, which form contained 27 categories of information;

(b) the compilation of a list of the titles of the approximately 870 technical and engineering documents submitted and the filing of these documents by assigned numbers;

(c) the identification and marking as confidential of the identity of the victim and of documents covered by the

attorney-client privilege and the attorney work product doctrine; and

(d) the weeding out of duplicate or related accidents.

16. Shortly after Tracor-Jitco began its work, the contract was amended to provide for the processing of an additional number of accident and engineering reports and to add a fifth task for the contractor. The fifth task was to re-edit and correct key-punch and coding errors.

17. As a result of the contractor's and the Commission's efforts to process the data submitted under the special orders and subpoenas, the Commission now has nine file cabinets containing information on 7,620 TV-related accidents, each of which is in a separate file folder under the manufacturer's name, and each of which has been reviewed to identify for confidentiality purposes the accident victim's identity and any documents subject to attorney-client privilege or attorney work product doctrine. In addition, the information abstracted from each accident report has been computerized and is available in print-out form. Finally, there exists a listing of the 870 technical documents submitted.

18. To assist in the processing of the TV-related accident data and to analyze and summarize the data following completion of the data processing, the Commission hired a consultant, Robert A. Yereance. Mr. Yereance has prepared for the benefit of the offeror which has been selected to develop a TV standard, a report entitled, "Analysis of TV Accident Data." This report, which is based upon the accident data submitted to the Commission by the manufacturers, analyzes that data in terms of the number of television sets in use in the United States and the relative incidence of television-related accidents. The report does not identify a particular manufacturer, TV model, or chassis; it contains only industry-wide statistics. The purposes of this report were to answer basic questions concerning TV-related hazards, to provide a picture of the magnitude or relative significance of the hazards that exist in TV sets currently in use, and to point out information which should prove valuable in the development of a standard to reduce hazards.

19. On March 28, 1975, the Commission decided to release the TV-related accident data submitted pursuant to the special orders and the subpoenas, except for the identity of accident victims and any documents subject to the attorney-client privilege or the attorney work product doctrine. The Commission at that time also laid down guidelines for determining the confidentiality of the technical information submitted. This decision was based upon the recommendations advanced to the Commissioners in a memorandum from the Office of the General Counsel, dated March 21, 1975, which appears in each of the administrative records submitted in these cases.

20. The guidelines for determining the confidentiality of the technical information have not yet been applied, since, by letter dated May 7, 1975 (attached hereto as Exhibit 10), the Information Act requests of Consumers Union and Health Research Group were narrowed to cover only the TV-related accident data. Therefore, at the present time, there is no outstanding request for the technical information, and thus, no such information is being released.

21. The basis of the Commission's decision to disclose the TV-related accident data is that such data is not exempt from disclosure under the Freedom of Information Act, and even assuming *arguendo* that it was exempt from disclosure as confidential commercial information, the public health and safety overrides the exemption from disclosure. A vital purpose served by release of the information was to inform the public that hazards may exist in operating television receivers.

22. The accident information which the Commission seeks to disclose is comparable to that disclosed by the Commission's predecessor, the National Commission on Product Safety, in 1970. The National Commission was created by Pub. L. No. 90-146 and was charged with conducting "a comprehensive study and investigation of the scope and adequacy of measures now employed to protect consumers against unreasonable risk of injury which may be caused by dangerous household products." Pub. L. No. 90-146, Sec. 2(a).

23. As part of its investigation into dangerous household products, the National Commission, by letter dated August 18, 1969, requested a number of television manufacturers, including all of the plaintiffs except Sharp Electronics, to furnish the National Commission with a listing of all incidents reported to them that relate to the alleged hazard of fire and smoke damage associated with television sets.

24. By letter dated January 9, 1970, the National Commission informed the manufacturers who had submitted accident data that said data was being released in the form of a report which specifically identified 122 television models by manufacturer's name that had a higher than average accident rate for fires. The report also contained a chart which ranked the manufacturers by the number of fire incidents per million sets sold by that manufacturer. A copy of the news release which accompanied this report on accident data is attached hereto as Exhibit 11.

25. Prior to the disclosure of the report and the accompanying news release, ten television manufacturers and the Electronics Industries Association objected to the release of the report on the following grounds:

(a) the data in the report were inaccurate and misleading because some companies maintained better records than other companies;

(b) some companies interpreted TV-related fire incidents more broadly than others and thus submitted more information; and

(c) the data were unsubstantiated and unverified.

26. As previously stated, notwithstanding these objections, the report was released and the Commission is unaware of any harm that accrued to any of the manufacturers as a result of that release.

27. In regard to the current accident data that the Commission would release but for the outstanding temporary restraining orders, the TV manufacturers have been afforded the opportunity to submit for review any errors or discrepancies that may have occurred on the computer print-out. For example, Sony Corp., whose

accident data was released, informed the Commission by letter dated April 22, 1975, that a lawsuit involving one of its reported accidents had been dismissed. This letter was released along with Sony's accident information. In addition, by letter dated May 9, 1975, Counsel for General Electric Corp. informed the Commission of possible errors and duplicates in the computer print-out of the G.E. accident data. By letter dated May 22, 1975 (attached hereto as Exhibit 12), the Commission informed Counsel for G.E. that he would be afforded the opportunity to review G.E.'s accident data in the possession of the Commission to determine if any errors did exist on the print-out and to inform the Commission if any errors did, in fact, exist on the print-out. This letter was sent to the other plaintiffs in order to afford them the same opportunity, in regard to their own data.

28. Additionally, the following disclaimer by the Secretary of the Commission was attached to the accident data of Sony Corp., Wells-Gardner Electronic Corp., and Sanyo Electric, Inc. which are not under temporary restraining orders and which have been released:

"The television accident statistics being released to you may be misleading because some television manufacturers were more conscientious than others in maintaining television accident files."

29. In sum, the Commission decided to release the accident information in an effort to comply with the intent of the Freedom of Information Act and to further the public interest. The Commission believed that it had taken reasonable steps to insure that the information proposed to be released was accurate and that its disclosure would not be misleading. The Commission believed that disclosure of the information would serve the important purpose of informing the public that hazards may exist in operating television receivers. Furthermore, the Commission felt that disclosure of the information would provide consumers with an indication of the kinds of questions that they should consider when purchasing a television set. Finally, the Commission

hoped that the large data base of TV-related accidents that it had compiled would be useful to other parties interested in investigating the potential hazards associated with television receivers.

/s/ Constance B. Newman
CONSTANCE B. NEWMAN

Subscribed and sworn to before me this 27th day of June 1975.

/s/ Illegible
Notary Public
My commission expires March 31, 1979

EXHIBIT 1

CONSUMERS UNION
 A NONPROFIT ORGANIZATION
 PUBLISHER OF CONSUMER REPORTS
 Washington Office: 1714 Massachusetts Avenue,
 Washington, D.C. 20005 / 202-705-19

June 14, 1974

Ms. Sadye Dunn, Secretary
 Consumer Product Safety
 Commission
 Washington, D.C. 20207

Dear Ms. Dunn:

This is a request for information under the Freedom of Information Act, 5 U.S.C. § 552.

Consumers Union wishes to inspect and/or to copy the information submitted by television manufacturers in response to the Commission's Special Order dated May 13, 1974. The requested documents include TV-related accident data; current future-planned, and suggested TV-related safety standards: quality control and quality assurance plans; service technician information; improvement plans for presently used TV sets; information on specific technical areas; information on company standards which exceed UL standards; and tests to assure compliance with higher standards; all as delineated in the Commission's Special Order.

Please notify us of the time and place for our inspection of the materials.

Very truly yours,

/s/ Marsha N. Cohen
 MARSHA N. COHEN
 Attorney, Washington
 Office

cc: Michael Brown, Esq.
 Chairman Richard O. Simpson
 Commissioner Barbara Franklin
 Commissioner Lawrence Kushner
 Commissioner Constance Newman
 Commissioner R. David Pittle

EXHIBIT 2

HEALTH RESEARCH GROUP
2000 P Street, N.W.
Washington, D.C. 20036

672-0320

June 14, 1974

Secretary
Consumer Product Safety Commission
Washington, D.C. 20207

Dear Ms. Dunn:

On May 13, 1974 the Consumer Product Safety Commission issued Special Orders under Section 27(b)(1) of the Consumer Product Safety Act which were addressed to the manufacturers of television sets. The Special Orders called for information relative to six different categories which could aid the Commission in attempt to determine the seriousness of television related accidents and an appropriate response:

- 1) Television related accidents data collected since the 1969 hearings held by the National Commission on Product Safety, with an explanation of the methodology used in assembling the data
- 2) Standards currently used by the manufacturer, those planned for use in the near future (including effective dates) and those suggested for future use. In particular, the manufacturers were ordered to report on the implementation status of each safety standard improvement recommendation set forth in the 1969 "Electronics Industry Association Ad Hoc Engineering Report on Television Fires".
- 3) Quality control and quality assurance plans, including those in current use, planned for future use and suggested for future use.

- 4) Data on present and planned qualification requirements for television service technicians.
- 5) Improvement plans for presently used television sets.
- 6) Information on the following design techniques:
 - (a) techniques for protection against overheating;
 - (b) direct AC to DC chassis design;
 - (c) use of compact portable television sets and sets with thermoplastic enclosures; and
 - (d) minimizing dielectric shock on chassis components.

As is our right under 5 U.S.C. 552, the Health Research Group wished to obtain full copies of the responses of all manufacturers to the Special Orders. In the alternative, we would want to be notified of times at which we may view the documents, take notes and make copies.

If the Commission chooses to withhold any portion of any such response, we request a statement from the Commission of the general nature of the material withheld and the grounds on which the Commission deemed such a deletion to be lawful.

While it is, of course, difficult to make definitive statements concerning material which we have not yet had a chance to examine the Health Research Group wishes to express its strongly held view that information relating to the hazard potential of a product and data on product-related injuries does not and can not fall within any of the exemptions to the Freedom of Information Act. . . . While such information may be embarrassing and, potentially, expensive to a manufacturer, there is no warrant for finding it to be a "trade secret, commercial or financial information and confidential or privileged" within the meaning of the fourth exemption to the Act, 5 U.S.C. 552(b)(4). Similarly, adherence or failure to adhere to a given voluntary standard (and the quality control procedures used to verify adherence) also fall outside the fourth exemption.

Requests #5 and #6 in the Special Orders call for replies which may include information about processes and manufacturing methods. In assessing whether any such information should be excluded from disclosure, we think that the Commission should keep in mind the following two standards laid down by the courts:

"Trade secrets" within former section 1335 of Title 19 ordinarily meant an unpatented secret; commercially valuable plan, appliance, process or formula. *U.S. ex rel. Norwegian Nitrogen Products Co. v. U.S. Tariff Commission*, 6 F.2d. 491, 55 App. D.C. 366 (1925)

[D]ata available to any persons with resources and facilities to perform tests and [which] did not contain trade secrets or other information prohibited from disclosure by this section [18 U.S.C. 1905] . . . would not be exempted from disclosure under section 552 of Title 5. *Consumer Union of U.S. Inc. v. Veterans Administration*, 301 F. Supp. 796 (D.C.-N.Y. 1969).

We understand these cases to say that for information to be exempt from disclosure under the fourth exemption of the Freedom of Information Act and under 18 U.S.C. 1905, it must truly be secret and valuable, not merely unknown to the person petitioning for disclosure, but to others in the same line of business who, if they the information, would provide greater competition to the parties seeking to keep the information hidden. Thus processes and procedures well-known within the industry, though not to outsiders, would not be exempt.

We urge the Commission to give attention to this matter and reply promptly.

Sincerely,

/s/ David Charles Masselli
DAVID CHARLES MASSELLI
Staff Attorney
Health Research Group

EXHIBIT 3

HEALTH RESEARCH GROUP
2000 P Street, N.W.
Washington, D.C. 20036

872-0320

July 11, 1974

Sadye Dunn
Secretary
Consumer Product Safety Commission
1750 K Street, N.W.
Washington, D.C. 20207

Dear Ms. Dunn:

Having been afforded an opportunity to view those portions of the submissions by television manufacturers to Special Orders issued by the Commission, the Health Research Group wishes to inform you that this material does not constitute a complete response to our request of June 14, 1974 for access to this material as is our right under the Freedom of Information Act, 5 U.S.C. 552.

Without precluding or limiting our previous demand for all materials contained in those submissions, we wish to call to your attention the claims by Admiral, General Electric, GTE Sylvania, Matsushita, Motorola, RCA, Sears, Teledyne, Packard Bell, Tobishita, Warwick, Wells-Gardner, and Zenith that their answers to Inquiry #1 in the Special Orders were privileged.

We hope that you will act quickly to require these manufacturers to clarify their claims and make a ruling on them. In the absence of any procedures for Freedom of Information requests in the Commission, we request the right to review and reply to any and all briefs justifying claims of exemption prior to a final ruling by the Commission.

We would appreciate your forwarding this letter to any manufacturers or other recipients of Special Orders

to place them on notice of our continuing intention to gain access to all materials required by the Special Orders.

Sincerely,

/s/ David Charles Masselli
DAVID CHARLES MASSELLI
Staff Attorney

cc: Richard O. Simpson, Chairman
Lawrence M. Kushner, Vice Chairman
Barbara Hackman Franklin
Constance E. Newman
R. David Pittle
Michael Brown, Esq., General Counsel
Edward Cullen, Esq., Office of the General Counsel
Stephen Lemberg, Esq., Office of the General Counsel
Donald Johnson, Assistant Secretary

EXHIBIT 4

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

Jul. 23, 1974

Marsha N. Cohen, Esquire
Consumers Union
1714 Massachusetts Avenue
Washington, D.C. 20036

Dear Ms. Cohen:

This is in response to your letter of June 14, 1974 requesting that the Commission disclose the information submitted by television manufacturers in response to the May 13, 1974 Order of the Commission.

The Commission recognizes its obligation under the Freedom of Information Act, 5 U.S.C. 552, to disclose all records that are not exempt from disclosure. Therefore, as you know, the Office of the Secretary now has available for inspection and copying by the public all the information received from TV manufacturers for which no claims of confidentiality have been asserted. The Freedom of Information Act also provides that trade secrets and certain commercial or financial information may be exempt from public disclosure. Accordingly, certain categories of information submitted by the TV manufacturers were accompanied by assertions of confidentiality.

We enclose copies of the Commission Order of May 13, 1974 which lists the categories of information requested by the Commission as well as a covering letter which describes the procedure for handling information claimed to be confidential. The letter states that such materials would not initially be made available to the public and that the TV manufacturers would be informed if requests for disclosure are received. Therefore, the TV manufacturers who claimed confidentiality will be informed of your request for disclosure in order to substantiate their claims for confidentiality.

The Commission intends to respond to your request for the TV data as expeditiously as technical analysis and evaluation of the materials for withholding or disclosure will permit. Upon completion of our review, we will make available a description of the information for which confidentiality is claimed, and a list of those portions of the information which were found to be confidential. At that time, those concerned will have an opportunity to determine whether they desire to appeal this initial determination.

Sincerely,

/s/ Sadye E. Dunn
SADYE E. DUNN
Secretary

Enclosures

EXHIBIT 5

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

Jul. 23, 1974

David Charles Masselli, Esquire
Health Research Group
2000 P Street, N. W.
Washington, D. C. 20036

Dear Mr. Masselli:

This is in response to your letter of June 14, 1974 requesting that the Commission disclose the information submitted by television manufacturers in response to the May 13, 1974 Order of the Commission.

The Commission recognizes its obligation under the Freedom of Information Act, 5 U.S.C. 552, to disclose all records that are not exempt from disclosure. Therefore, as you know, the Office of the Secretary now has available for inspection and copying by the public all the information received from TV manufacturers for which no claims of confidentiality have been asserted. The Freedom of Information Act also provides that trade secrets and certain commercial or financial information may be exempt from public disclosure. Accordingly, certain categories of information submitted by the TV manufacturers were accompanied by assertions of confidentiality.

We enclose copies of the Commission Order of May 13, 1974 which lists the categories of information requested by the Commission as well as a covering letter which describes the procedure for handling information claimed to be confidential. The letter states that such materials would not initially be made available to the public and that the TV manufacturers would be informed if requests for disclosure are received. Therefore, the TV manufacturers who claim confidentiality will be informed of your request for disclosure in order to substantiate their claims for confidentiality.

The Commission intends to respond to your request for the TV data as expeditiously as technical analysis and evaluation of the materials for withholding or disclosure will permit. Upon completion of our review, we will make available a description of the information for which confidentiality is claimed, and a list of those portions of the information which were found to be confidential. At that time, those concerned will have an opportunity to determine whether they desire to appeal this initial determination.

Sincerely,

/s/ Sadye E. Dunn
SADYE E. DUNN
Secretary

Enclosures

EXHIBIT 6

CONSUMERS UNION
A NONPROFIT ORGANIZATION
PUBLISHER OF CONSUMER REPORTS
Washington Office: 1714 Massachusetts Avenue,
Washington, D.C. 20036 / 202-785-1906

October 16, 1974

Ms. Sadye Dunn

Secretary
Consumer Product Safety Commission
Washington, D.C. 20207

Dear Ms. Dunn:

On August 2, 1974, I was notified by Mr. Johnson of your office that the Commission was giving the television manufacturers an opportunity to substantiate their claims that certain information which we have requested under the Freedom of Information Act is confidential and not subject to disclosure.

The manufacturers were given until August 30 to submit their substantiation. Although six weeks have passed since then, we have received no indication as to when the Commission would respond to our initial request for this data. As you are aware, the proposed commission regulations under the Freedom of Information Act indicate that requests for records shall be responded to within ten working days of their receipt. It has been months since our initial request. Please immediately take the appropriate measures to respond to our initial request for information under the Act. We would be obliged to treat any further delay as a denial of our request.

I would appreciate your immediate attention to this matter.

Very truly yours,

/s/ Marsha N. Cohen
MARSHA N. COHEN
Attorney
Washington Office

cc: Comm. Barbara Franklin
Comm. Lawrence Kushner
Comm. Constance Newman
Comm. David Pittle
Comm. Richard Simpson
Michael Brown, Esq.

EXHIBIT 7

PUBLIC
CITIZEN

October 21, 1974

Ms. Sayde Dunn
Secretary
Consumer Product Safety Commission
Washington, D.C.
20207

Dear Ms. Dunn:

By letter of June 14, 1974, the Health Research Group requested the opportunity to view submissions made by manufacturers of television sets to the Special Orders issued by the Commission on May 13, 1974.

An opportunity was afforded us to view some materials not claimed confidential and on July 11, 1974 we wrote the Commission to express our contention that our initial request had not been satisfied and to renew our Freedom of Information request.

You responded on July 23, 1974 to indicate that our original request would be responded to "as expeditiously as technical analysis and evaluation of the materials for withholding or disclosure will permit."

A letter from the Assistant Secretary, Mr. Donald Johnson, was sent on August 2, 1974 and contained an enclosure which was a copy of a letter sent to manufacturers informing them of the two requests by the Health Research Group and that of Consumers Union and giving them until August 30, 1974 to substantiate claims of confidentiality for materials submitted in response to the Special Order of May 13, 1974 or Commission subpoenas issued on July 26, 1974.

Seven weeks have passed since the August 30, 1974 deadline and the Commission has given no indication of its decisions with respect to the material submitted. Nor have we been afforded an opportunity to view materials submitted in response to the July 26, 1974 subpoenas for which no claims of confidentiality were made, if any

such materials exist. In addition, we have been given no list of materials submitted in response to the July 26, 1974 subpoenas for which claims of confidentiality do exist, identifying the maker of the claim, the general nature of the material for which confidentiality is claimed and the reasons for making the claim.

I believe that it is imperative that materials for which no claims of confidentiality have been made become available for viewing immediately. Further, I can see no reason why the identities of those submitting data in response to the subpoenas who did claim confidentiality not be made public, along with a general description of the areas for which confidentiality was claimed and a statement of reasons advanced in support of confidentiality.

The Health Research Group is well aware of the complexity and sheer volume of the matter under discussion and sympathetic to the demands it must place on the resources of your staff. Therefore, we have not previously written to complain of the length of time the process is taking.

The present situation leaves us no choice but to indicate, as is required by 16 CFR 1015.5, that we will consider a failure to respond in full to our requests of June 14, 1974 and July 11, 1974 on or before November 1, 1974 to be a denial of those requests.

Sincerely,

/s/ David Charles Masselli
DAVID CHARLES MASSELLI
Staff Attorney

EXHIBIT 8

Subject of Meeting:

Health Research Group and Consumers Union Freedom of Information requests for TV data submitted in response to CPSC subpoenas.

Date and Place of Meeting:

Morning of 11/5/74, Office of the Secretary, USCPSC, 1750 K Street, N. W., Washington, D. C.

Commission Participants:

Ms. Sadye Dunn, OS
Mr. James Heffron, OS
Ms. Bea Pitkin, OGC
Mr. Edward Cull, OGC
Mr. Richard Allen, OGC
Mr. Vincent Rocque, Office of Commissioner Franklin
Mr. Robert Northedge, BES
Mr. Robert Yerrance, Consultant

Non-Commission Participants:

Mr. David Masselli, Health Research Group
Ms. Marcia Cohen, Consumers' Union
Mr. Edward Sauer, Representative of Electronic Industries Association.

The meeting was called by CPSC staff in order to review the status of the Freedom of Information requests for TV data filed by the Health Research Group and Consumers' Union. Mr. Edward Cull opened the meeting with a general statement as to the volume of information and the difficulties in reviewing such a large amount of data. He estimated that the submissions from all manufacturers totalled 45 cubic feet or 120,000 pages; approximately 50,000 pages of this material represents duplicates that are not readily identifiable. Mr. Cull further estimated that the data submitted contained 60,000 pages of accident reports. He stated that the

material is being reviewed and categorized with an eye to the following:

- (1) the pending Freedom of Information requests;
- (2) utilization of the data by the Commission;
- (3) the legal evaluation as to whether the submission complied with the subpoenas.

Messrs. Cohen and Masselli then raised questions pertaining to the nature of any claims of confidentiality made by the manufacturers with regard to the data submitted. They expressed concern about the Commission honoring blanket claims of confidentiality and suggested that there is a legal basis for dismissing claims that are not specific.

Mr. Masselli cited a possible inconsistency on the part of the Commission in routinely releasing 15b reports and withholding the accident reports at hand in order to scrutinize their accompanying claims of confidentiality. Ms. Dunn observed that 15b reports are reviewed insofar as any claims of confidentiality are concerned; she added that 15b reports constitute a different category of information from that information with which this meeting is concerned; e.g. subpoenaed raw files.

Ms. Cohen suggests that the Commission choose one company "representative" of the manufacturers, review all the accident data submitted by the company, and make one decision that could be applied to the release of all accident data collected. Mr. Yerrance, consultant to the Commission, remarked that the accident data submitted by one manufacturer is not comparable to that of other manufacturers; the decision to release or withhold accident data would have to be made on a case by case basis.

Mr. Masselli suggested that the Commission consider for the future requiring that submissions made in response to a subpoena be uniform in character. He proposed that the Commission require the subpoenaed parties to index and summarize their submissions. Mr. Cull observed that a legal evaluation would have to be made as to how far a subpoena could go in specifying the degree of uniformity required of a submission. Mr. Yerrance

remarked that from a technical perspective, he was reluctant to try to impose any limit on a submission. He pointed out that some data may be lost if a manufacturer is required to index and categorize its submission. Ms. Cohen recommended that the Commission may want to consider Mr. Masselli's proposition in light of its Freedom of Information guidelines, which require the Commission to provide a response within a short period of time.

Messrs. Cohen and Masselli observed that their Freedom of Information requests of June, 1974, which referred to the data the Commission had been provided by TV manufacturers in response to its Special Orders, were as yet not fully answered. Therefore, they further commented that they had allowed their requests of June to go unattended with the knowledge that they would have access to more and better information once the TV manufacturers had responded to the Commission's subpoenas. Mr. Cull and Ms. Dunn acknowledged that they had been working on the assumption that the more comprehensive response was consistent with the requesters' intent.

The issue of how much time the Commission will need to respond to the pending Freedom of Information requests was raised. Mr. Cull said that the information for which no claims of confidentiality had been made could be assembled immediately, he added that this class of data was considered to be available upon request. Mr. Cull then distributed a set of charts categorizing the submissions insofar as any claims of confidentiality are concerned; the charts indicate a small amount of information not claimed to be confidential. Mr. Cull projected that the legal review of the TV data that is presently under way would be completed by the end of the year (or the beginning of 1975). He further conjectured that implementation of the legal decision as to what claims would be honored and what information would be released would come several months after the legal review had been completed. Mr. Cull noted that additional staff is being sought in order to catalog and prepare the data for release and possible transfer onto punch cards, which

could be made available to the requesters. He added that this idea had not been fully explored and that Messrs. Cohen and Masselli could expect a final decision on the form in which information could be supplied in the months ahead. The question as to whether Health Research Group and Consumers' Union would have access to Consumer Product Safety Commission computer facilities was raised for future consideration.

Messrs. Cohen and Masselli suggested that the Commission clarify, in its proposed Freedom of Information regulations, which party (submitter, requester, or Commission) shall bear the costs of reviewing data in regard to claims of confidentiality. Ms. Cohen and Mr. Masselli also proposed that the Commission make additions to its Freedom of Information regulations to the effect that the submitter of information has appeal recourse to the Commission itself as well as the courts in instances of disputed claims of confidentiality.

All parties agreed that the TV manufacturers' statements or briefs in support of claims of confidentiality shall be released to the requesters as soon as possible. Mr. Cull mentioned the possibility of going directly to the Commissioners for an immediate decision of the claims. Mr. Masselli suggested that, instead of going straight to the Commissioners for a ruling on the claims of confidentiality, the Secretary of the Commission make the initial decision as contemplated in the Freedom of Information regulations. He argued that an appeal within the Commission itself as to the integrity of any of the claims of confidentiality preserved the opportunity to refine the issues and possibly avoid a timely court proceeding.

Mr. Yerrance proceeded to describe the manner in which the accident data would be reviewed. As proposed, any and all useful data would be put on computer punch cards; he remarked that, in addition to being the most economical method for storing the information, the punch cards would allow the data to be sorted and made available in a variety of meaningful categories. Mr. Yerrance remarked that punch cards are flexible and data could

be transferred to magnetic tape if desired by the requester.

Mr. Masselli suggested that the Commission use the raw sales data of each TV manufacturer to compile an industry-wide picture of sales. Mr. Cull remarked that this would be possible provided that individual manufacturers' sales data was not identified.

In closing, Mr. Cull stated that the standards and design material would be releasable when the relevant legal decision had been made (by January). He projected that the accident data would be released some time near the middle of March. He noted that this timetable assumed adoption of the plan to add two technical experts and four clerical workers to the present staff committed to working on the TV data. Mr. Cull emphasized that the notion of punch cards, while proposed, has not received official approval.

Prepared by James Heffron

TV ACCIDENT DATA

FILE NUMBER

MANUFACTURER

MODEL NUMBER

CHASSIS NUMBER

TV COLOR

B - black & white
C - color
U - unknown

CHASSIS TYPE

H - hot chassis
I - isolated
U - unknown

SWITCH TYPE

I - instant on
N - not instant on
U - unknown

MODEL TYPE

P - portable
T - table
C - console

CABINET MATERIAL

P - plastic
M - metal
W - wood
A - plastic & metal

YEAR OF MANUFACTURE

OWNER'S INITIALS

6	7	8

9	10	11	12	13	14	15	16	17	18							

19	20	21	22	23	24	25	26	27	28								

29	

30	

31	

32	

O - other
U - unknown

33	

B - plastic & wood
C - metal & wood
D - plastic, metal & wood
U - unknown

34	35

36	37	38

FAILED PART

PT - power transformer
 AT - antenna
 VM - voltage multiplier
 RT - rectifier
 CP - capacitor

OP - on-off switch
 LC - line cord
 AT - antenna
 OT - other
 UU - unknown

39 40

LOCATION IN SET

HV - high voltage
 VA - Yoku area
 BP - B+ (filter circuit)
 VC - video circuit

AC - audio circuit
 TN - tuner
 OT - other
 UU - unknown

41 42

PRIOR INDICATION OF TROUBLE

Y - yes
 N - no

U - unknown

43

REPAIRED PRIOR TO ACCIDENT

Y - yes
 N - no

U - unknown

44

ELECTRIC POWER STATUS

ON - on
 OF - off

UP - unplugged
 UU - unknown

45 46

TIME IN ELECTRIC POWER STATUS

a) NUMBER OF UNITS

b) TIME SCALE

M - minutes
 H - hours
 D - days

W - weeks
 O - months
 U - unknown

47 48

49

TYPE OF ACCIDENT

F - fire
 S - shock
 I - implosion

O - other
 U - unknown
 B - fire + implosion

50

TIME OF DAY (nearest hour)

24 hour day

51 52

STATE

Valid State Code

53	54
----	----

LOCATION

B - basement
F - first floor
S - second floor
A - above second floor
T - outside
O - other
U - unknown

55

NUMBER OF INJURIES

56	57
----	----

NUMBER OF FATALITIES

58	59
----	----

DAMAGE

T - tv only
O - tv and other damage
N - none
U - unknown

60

CLAIM 1

a) NUMBER OF UNITS

61	62	63
----	----	----

b) AMOUNT SCALE

D - dollars
H - hundreds of dollars

64

c) TYPE OF CLAIM

M - medical
C - combination

65

K - thousands of dollars
M - millions of dollars

CLAIM 2

a) NUMBER OF UNITS

66	67	68
----	----	----

b) AMOUNT SCALE

D - dollars
H - hundreds of dollars

69

c) TYPE OF CLAIM

P - property

70

K - thousands of dollars
M - millions of dollars

U - unknown

DATE OF ACCIDENT (mmddyy)

71	72	73	74	75	76
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EXHIBIT 10

CONSUMERS UNION
A NONPROFIT ORGANIZATION
PUBLISHER OF CONSUMER REPORTS
Washington Office: 1714 Massachusetts Avenue,
Washington, D.C. 20036 / 202-785-1906

May 7, 1975

Ms. Maryanne Kane
Consumer Product Safety Commission
1750 K Street, N.W.
Washington, D.C. 20207

Dear Ms. Kane:

This letter will confirm the substance of our conversation of May 6, 1975, and responds to your request for clarification of the scope of our request.

On June 14, 1974, Consumers Union and Public Citizen's Health Research Group filed a request with the Commission under the Freedom of Information Act for copies of or access to all documents submitted pursuant to Special Orders dated May 13, 1974. Such documents included both TV-related accident data and certain technical information relating to television construction.

On July 26, 1974, the Commission issued subpoenas compelling 16 TV manufacturers to produce TV-related accident data and certain technical documents. Shortly thereafter, Consumers Union, the Health Research Group, and representatives of the Commission agreed orally that the June 14, 1974 request would be construed by the Commission to apply to the documents submitted in response to both the Special Orders and the subpoenas, as well as to products of the Commission's processing of such documents. That agreement is documented in the Commission's minutes of a November 5, 1974 meeting, at which the status of the FOIA request was discussed.

Consumers Union and Health Research Group subsequently agreed with the Commission staff to narrow their request to include only the TV-related accident data,

not the technical documents. No request by Consumers Union or Public Citizen relating to standards or design of TV's is currently pending before the agency.

Our suit in the District Court of the District of Columbia seeks the release of information requested as described above, with the additional limitations imposed by the Commission and acceptable to us that (1) names of accident victims, and (2) information within the work product doctrine are not public.

Very truly yours,

/s/ Nancy H. Chasen
NANCY H. CHASEN
Attorney, Washington Office

EXHIBIT 11

NAT'L. COMMISSION ON PRODUCT SAFETY HEARINGS

Washington, D.C.—March 5, 1970

NATIONAL COMMISSION ON PRODUCT SAFETY NEWS

1016 - 16th Street, N.W., Washington, D.C. 20036

Eleanor Pollock
Ruth K. Holstein
202-382-5534

For Immediate Release
January 27, 1970

COMMISSION RELEASES INFORMATION ON COLOR TV HAZARDS

The National Commission on Product Safety today released the brand names and model numbers of color television receivers which it said exceeded the industry average for fire hazards.

At the same time the Commission, a fact-finding and study panel lacking regulatory powers, wrote involved manufacturers urging them to take steps to rectify potential hazards in any of the listed sets and citing recall, repair or replacement of faulty components as appropriate actions.

The letters to the electronic firms acknowledge that publication of model numbers would burden servicing facilities and that some of the listed models might not have defective components.

"Nevertheless," wrote Chairman Arnold B. Elkind, "we believe it essential that this information be furnished to the public and that appropriate action be taken . . . rather than risk the consequences of fires in color television receivers."

Approximately 22 million color TV sets are in use today. The smoke and fire incident ratio for color versus black and white TV is about 40 to 1.

The industry average of 0.120 incidents per thousand color sets was developed from information submitted to the Commission by manufacturers on the number of smoke and fire claims reported to them involving their products.

John I. Thompson and Co., technical engineers, were employed by the Commission to analyze the data. That firm ascertained the industry mean by dividing the number of fire incidents reported by the number of sets sold.

The Thompson Co. then advised the Commission that the following manufacturers, in descending order exceeded the industry average: Lear Siegler (Olympic), Packard Bell, Magnavox, Sylvania, Philco-Ford and RCA.

Other manufacturers also reported incidents, but their aggregate incident rate was below the industry average. These were in descending order: General Electric; Admiral; Motorola; Emerson; Warwick (Sears); and Zenith.

The following is a list of 122 models which have had 3 or more incidents per 10,000 sets sold—more than twice the industry average.

Admiral—Models AK5598; C5311.

Emerson—Model 21T01.

General Electric—Models M902; M900; M961; M901; M960; M280; M912; M258; M946; M920.

Lear Siegler (Olympic)—Models CK5413; CK5374; CK5368; CC3352; CC326; CC5359; CC5355; CC3345; CC3337.

Magnavox—Models U554; U504; T542; T540; T560; T539; U556; U546; U553; T541; T549; T543; T508; T538; T537; T507; T557; T558; T547; T534; T561; T562; T544; T568; U532; T566; T509; U524; T514; T552; U506; U505; T550; T548.

Motorola—Models 23RL325; 23CL328BS; CL803CS; WL851; CU610CW; CU612; 23CL325.

Packard Bell—Models CSW504; CSW402; CSW804; CSW500; CSW501; 25CD2; CSW702; CSW606; CSW602; CSW502.

Philco-Ford—Models Q5528; P6000; P5230; P6404; R5652; R5609; R6520; Q6420; Q5488; R6508.

RCA—Models GG739; HH864; HG685; HL850; HG809; GL736; GF731; GG721; HH844; HL872; JH640; GG607; GF753; GG643; GG661; GG733; GF636; FF555; GG667; GG843.

Warwick (Sears Roebuck—Models 3123; 41912; 4190; 41952.

Sylvania—Models 25LC47; 25LC24PW; 25HC83; 25LC46; 25LC122B; 25HC71; 25LC19; 25LC113; 21LC36; CF481; 25LC114C; 21LC21; 25LC10; 21LC35.

The Commission's suggested recall involves more models of Magnavox than of any other manufacturer, but that company advised the Commission that each of its identified models was made during 1964 and 1965 and that "it has had no reports of comparable problems for later models."

Seventeen manufacturers representing more than 95 percent of the TV industry submitted information to the Commission during its fire hazard survey. The study was undertaken last October following consumer complaints, newspaper reports and Congressional inquiries. Since data submitted by four Japanese manufacturers were not comparable to that of U.S. manufacturers, Japanese brands were not included in the Commission survey. Industry-wide lack of uniform record-keeping prompted the Commission to suggest and the industry to agree to a more uniform system of recording information.

A Commission staff spot-check of major city fire departments which ascertain specific categories of causes of fires revealed varying numbers attributed to TV sets: 361 in New York in 1968; 215 in Chicago in 1969 (including radios); 13 in Houston since October 1967; an estimated 60 in Omaha in 1968; 43 in Denver in 1968; 131 in San Francisco since 1967; 112 in suburban Los

Angeles in 1968. The Commission says that a conservative estimate relates about 10,000 fires each year to TV sets.

At a meeting between the Commission and TV industry representatives October 31, manufacturers agreed to assign top technical experts to a crash program to develop maximum safety standards aimed at preventing fires in color receivers.

Meantime, the Commission had pinpointed such TV component parts as flyback transformers, switches and yokes as possible causes of smoke and fire hazards in color sets.

When the industry presented the Commission with its proposed standards to minimize fire hazards in color sets, the Commission sent the proposals to an independent engineering firm—Tracor, Inc. of Austin, Texas—for evaluation.

Tracor advised the Commission that even further improvements should be made to the proposed upgraded standards, particularly in three fire-prone areas—flyback transformers, capacitors and yokes.

The Commission commended the industry for its efforts and urged that the additional proposals be taken under consideration.

EXHIBIT 12

ECull:apj:5/22/75

cc: —Admiral Corporation
 —General Electric Company
 —Magnavox Company
 —Matsushita Electric Corp. of America
 —Motorola, Inc.
 —RCA
 —Sharp Electronics Corp.
 —GTE Sylvania &
 Aeronutronic Ford Corp.
 —Teledyne Mid-American Corp.
 —Toshiba America, Inc.
 —Warwick Electronics, Inc.
 —Zenith Radio Corp.

William R. Wickers, Esq.
 [Illegible]
 1730 Penna. Avenue, N.W.
 Washington, D.C. 20005

Dear Mr.

Your letter of May 9, 1975, to Mr. Vincent DeLuise was referred to me for reply. In your letter, you requested that the Commission review the TV accident data submitted by your client, General Electric to determine the source of certain line items in the computer printout of General Electric's accident data. You also requested us to check if certain line items were duplicates and if there were some erroneous data included in two line items.

This is to inform you that the Commission will make available to you all the accident data submitted by General Electric so that you personally can determine the accuracy of the line items on the computer printout. The accident data is catalogued and numbered so that it corresponds to the number assigned to the accident on the computer printout.

After you have had an opportunity to check the accuracy of the computer printout of your client's data, you

may submit a list of errors to the Commission. The Commission will review your list of errors and notify you if any corrections are needed. If it is found that an error exists on the computer printout of your client's data, the error will be corrected.

If you would like to review General Electric's accident data, please contact Mr. Bert Simson (496-7606) to make the necessary arrangements.

Sincerely,

EDWARD J. CULL
Attorney
Office of the General Counsel

gc chron
gc files
gc reading (2)
E. Cull, OGG/A

[EXHIBIT B]

[Title Omitted in Printing]

AFFIDAVIT OF SHELDON D. BUTTS

Sheldon Butts, being duly sworn, deposes and says:

1. I am an Assistant Secretary of the Consumer Product Safety Commission. Part of my responsibilities as an Assistant Secretary is to maintain the custody of the official records of the Commission.

2. The Commission has invited the plaintiffs to examine their submissions and their line items on the computer print-out of their accident data. The Commission has stood willing to make any changes either on the print-out or in the accident files themselves, if a plaintiff can substantiate any inaccuracies or duplications or can show that any non-accident data was erroneously included by the plaintiff in its accident records.

3. Some of the plaintiffs, for example, Matsushita Electric Corporation of America (MECA), have contended that the Commission's proposed release will include sales data as well as accident data. A review of MECA's accident records revealed two instances where sales figures were erroneously provided with its accident data. In one of these instances, the sales statistics had been previously marked for nondisclosure and in the other instance, the sales figures when discovered were similarly marked for nondisclosure.

4. Finally, the data submitted by the plaintiffs in response to the requests in the Special Orders and Subpoenas for technical information has been separately catalogued and completely segregated from the accident data. This technical data, which is not part of the pro-

posed release, is presently being stored at the National Bureau of Standards.

/s/ Sheldon D. Butts
SHELDON D. BUTTS

Subscribed and sworn to before me this 2nd day of July, 1975.

/s/ [illegible]
Notary Public
My commission expires March 31, 1979.

EXHIBIT C

[SEAL]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

CERTIFICATE

Pursuant to the provisions of Rule 44 of the Federal Rules of Civil Procedure, I hereby certify that the attached copy of the Consumer Product Safety Commission's October 6, 1975 Executive Session minute, which contains the Commission decision and Commissioners' votes on the application of Section 6(b)(1) of the Consumer Product Safety Act, is a true copy of a document on file with the Consumer Product Safety Commission and is part of the official records of said Commission. In witness whereof, I have, pursuant to the provisions of Title 15, United States Code, Sections 2053(d) and 2076(b)(9), hereto set my hand and caused the seal of the Consumer Product Safety Commission to be affixed this 17th day of August, 1977.

/s/ Richard E. Rapps
RICHARD E. RAPPS
Secretary

[SEAL]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

1750 K Street, N. W.
Washington, D. C.
9:30 am

Presiding: Chairman Simpson

Present : Commissioner Newman
Commissioner Kushner
Commissioner Franklin
Commissioner Pittle

ITEM

Application of Section 6(b)(1) of the Consumer Product Safety Act (15 U.S.C. 2055(b)(1)). (Briefing package, consisting of "Policy Statement on Public Disclosure of Information" transmitted by Commissioner Newman on August 18, 1975 and General Counsel's opinion transmitted to Commission on September 19, 1975.)

DECISION

Section 6(b)(1) applies, as a matter of law, only to affirmative Commission disclosures (e.g. press releases, press conferences, publications, speeches,) but not to disclosures made pursuant to Freedom of Information Act requests. As a matter of policy, however, the Commission may attempt to provide Section 6(b)(1) protections with regard to certain disclosure of information generated by Freedom of Information Act requests.

VOTE

Concurring in the above decision:

/s/ R. Simpson
CHAIRMAN SIMPSON

/s/ B. Franklin
COMMISSIONER FRANKLIN

/s/ Larry Kushner
COMMISSIONER KUSHNER

/s/ R. David Pittle
COMMISSIONER PITTLE

Dissenting:

/s/ C. Newman
COMMISSIONER NEWMAN*

Submitted by: Commissioner Franklin

* Opinion to follow.

[Title Omitted in Printing]

MOTION OF GTE SYLVANIA AND
AERONUTRONIC FORD CORPORATION
FOR SUMMARY JUDGMENT

Plaintiffs GTE Sylvania Incorporated and Aeronutronic Ford Corporation* hereby move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the following grounds:

(1) The Consumer Product Safety Commission has announced its intention to publicly disclose certain "TV-related accident data" submitted by plaintiffs GTE Sylvania Incorporated and Aeronutronic Ford Corporation and by other manufacturers of television receivers and components;

(2) Section 6(b)(1) of the Consumer Product Safety Act prohibits public disclosure of information where the Commission fails to take reasonable steps to assure the accuracy of the information, or where disclosure would not be fair in the circumstances, or where disclosure is not reasonably related to effectuating the purposes of the Act;

(3) There is no genuine factual issue as to the following:

- (A) That the Commission failed to take reasonable steps to assure the accuracy of the data;
- (B) That public disclosure would not be fair in the circumstances;
- (C) That public disclosure is not reasonably related to effectuating the purposes of the Act;
- (D) That irreparable injury to plaintiffs would result from disclosure of the data; and
- (E) That enjoining release of the data would not harm the public.

* Now Ford Aerospace & Communications Corporation by change of name effective December 1, 1976.

(4) Since public disclosure of the "TV-related accident data" would contravene Section 6(b)(1), plaintiffs are entitled to a judgment as a matter of law prohibiting public disclosure of the data by the Consumer Product Safety Commission. Thus, judgment may be entered in favor of the plaintiffs without the necessity of deciding other possible grounds barring disclosure as to which disputed factual issues exist.

The factual and legal bases for this motion are set forth more fully in the accompanying memorandum.

Respectfully submitted,

JAMES M. TUNNELL, JR.

WILLIAM H. SUDELL, JR.
Morris, Nichols, Arsht
& Tunnell
P.O. Box 1347
Twelfth and Market Streets
Wilmington, Delaware
19899
(302) 658-9200

Of Counsel:

Harry L. Schniderman
Eugene C. Holloway
James M. McHaney, Jr.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

[Title Omitted in Printing]

MOTION TO ALTER OR AMEND JUDGMENT

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, defendants move to alter or amend the judgment and Permanent Injunction entered in this action on December 8, 1977. As grounds for this motion, defendants refer the Court to its Order of December 8, 1977, which permanently enjoins release of the data at issue in this litigation while the Court's Opinion of the same date holds that the "Commission still has not complied with Section 6(b)" and implies that release would be appropriate if the agency takes the steps required under section 6(b)(1) of the Consumer Product Safety Act. In support of this motion the Court is respectfully referred to its Opinion of December 8, 1977, and the memorandum in support of defendants' Motion to Alter or Amend Judgment filed herewith.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General

JAMES W. GARVIN, JR.
United States Attorney

BRUCE E. TITUS

SANDRA WIEN SIMON
Attorneys, Department of
Justice
Civil Division, Room 6343
Washington, D.C. 20530
Tel: 202-739-2240

Attorneys for Defendants

OF COUNSEL:

THEODORE GARRISH
General Counsel

ED CULL
JEANETTE WILTSE

Attorneys, Consumer
Products Safety
Commission

[Title Omitted in Printing]

ORDER DENYING DEFENDANTS'
MOTION TO ALTER OR
AMEND JUDGMENT

The Court having considered defendants' motion to alter or amend the judgment entered on December 8, 1977, pursuant to Rule 59(c), F.R.Civ.P. (Docket Item 127),¹ and defendants' memorandum in support thereof, it is

ORDERED that defendants' motion to alter or amend the December 8, 1977 judgment is denied.

Reason: When the Court stated in its December 8th opinion that the "Commission still has not complied with Section 6(b)" (slip op. 23), it was simply restating the undisputed fact that the Commission had taken no steps to comply with Section 6(b) during the two-year period after the preliminary injunction issued. (Slip op. 2). This language does not imply that release would be appropriate if the agency should at some indefinite time in the future make accurate the unverified material gathered in 1974. Indeed, the Commission has made no showing that it would ever be able to verify and make accurate the unverified information. Nevertheless, if at some time in the future the Commission is able to demonstrate to the Court its ability and willingness to take reasonable steps to assure the accuracy of the unverified material gathered in 1974 and to satisfy the other requirements of Section 6(b)(1), the Court presumably could then modify the outstanding permanent injunction to permit the release of the information to the public. Until the Commission is able to make such a showing, the proposed amendment to the injunction is not warranted.

Dated: December 22, 1977.

/s/ James L. Latchum
JAMES L. LATCHUM
Chief Judge

¹ Docket Items refer to Civil Action No. 75-104.

[Title Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that the Consumer Products Safety Commission hereby appeals to the United States Court of Appeals for the Third Circuit from the Judgment and Permanent Injunction entered in this action on the 8th day of December, 1977, and from the Order Denying Defendants' Motion to Alter or Amend Judgment of December 8, 1977, entered in this action on the 22nd day of December, 1977.¹

MARK N. MUTTERPERL, ESQUIRE
Department of Justice
Civil Division
Appellate Section
Washington, D.C. 20530

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¹ The opinion and judgment of the court of appeals of April 30, 1979, are printed at Pet. App. A (p. 1a) and B (p. 71a). The opinion and judgment of the district court of December 8, 1977, are printed at Pet. App. C (p. 77a).

SUPREME COURT OF THE UNITED STATES

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,
PETITIONERS

v.

GTE SYLVANIA, INC., ET AL.

ORDER ALLOWING CERTIORARI

Filed December 3, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.